

No. 15321

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United States  
Court of Appeals  
for the Ninth Circuit

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JOHN COSTELLO, as Trustee of the Estate of  
William Jason Evans, Bankrupt,  
Appellant,  
vs.

BANK OF AMERICA NATIONAL TRUST &  
SAVINGS ASSOCIATION, a Corporation,  
Appellee.

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Transcript of Record

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Appeal from the United States District Court for the  
Northern District of California.  
Southern Division.

FILED

DEC 26 1956



No. 15321

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**United States**  
**Court of Appeals**  
for the Ninth Circuit

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JOHN COSTELLO, as Trustee of the Estate of  
William Jason Evans, Bankrupt,  
Appellant,  
vs.

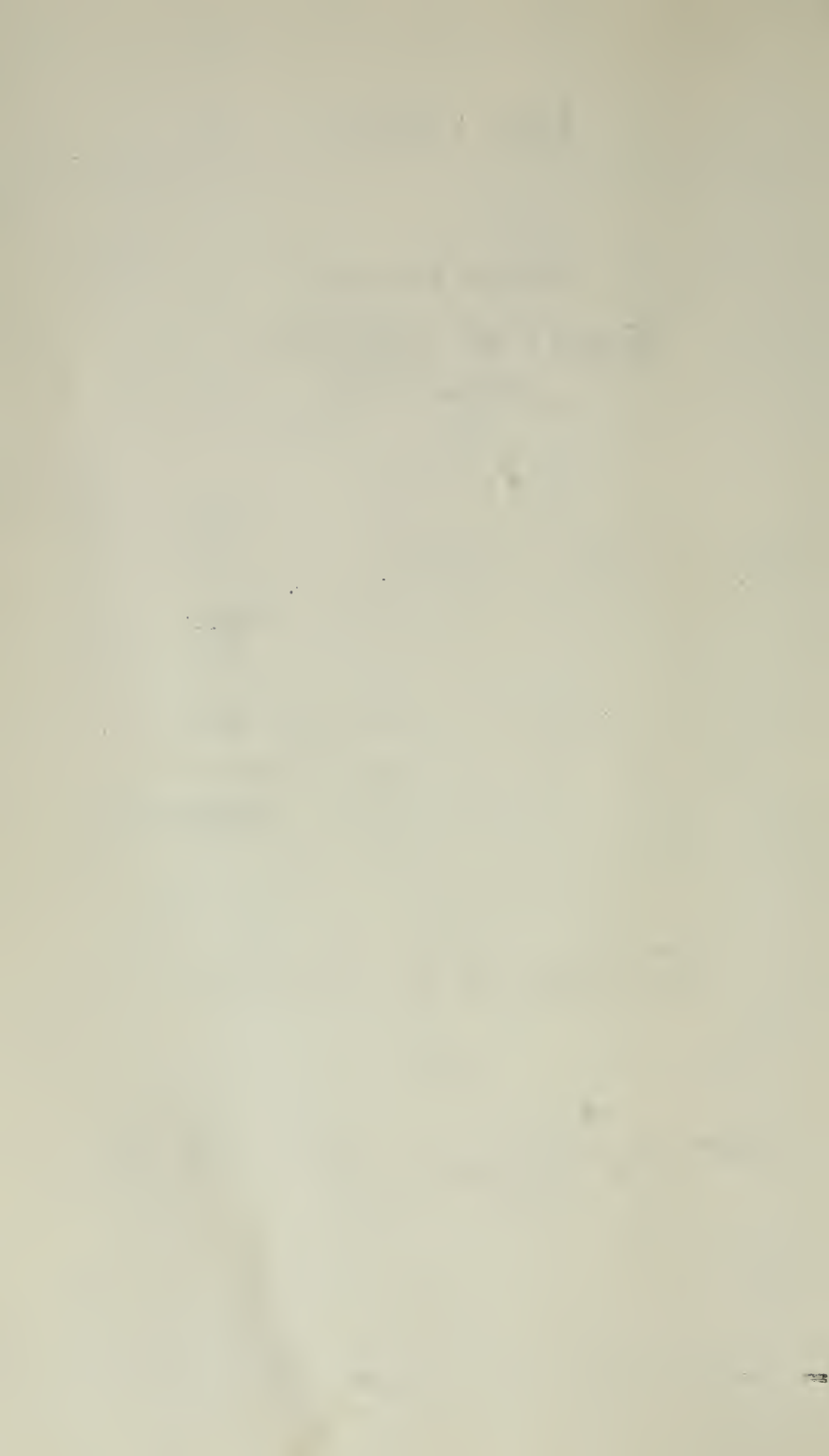
BANK OF AMERICA NATIONAL TRUST &  
SAVINGS ASSOCIATION, a Corporation,  
Appellee.

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**Transcript of Record**

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**Appeal from the United States District Court for the  
Northern District of California,  
Southern Division.**



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF COUNSEL

SHAPRO & ROTHSCHILD,

155 Montgomery Street,  
San Francisco 4, Calif.,

For Appellant.

SAMUEL B. STEWART,  
GEORGE CHADWICK, JR.,

300 Montgomery Street,  
San Francisco 4, Calif.,

For Appellee.





In the Southern Division of the United States  
District Court for the Northern District of  
California

No. 31390

JOHN COSTELLO, as Trustee of the Estate of  
William Jason Evans, Bankrupt,  
Plaintiff,

vs.

BANK OF AMERICA, NATIONAL TRUST &  
SAVINGS ASSOCIATION, a National Bank-  
ing Association,  
Defendant.

COMPLAINT TO SET ASIDE TRANSFER  
OF ACCOUNTS RECEIVABLE

Plaintiff complains of defendant, and, for cause of  
action, alleges:

I.

That the jurisdiction of the above-entitled Court  
is based on the provisions of Section 70(e) of the  
Bankruptcy Act [11 USC, Sec. 110 (e)].

II.

That William Jason Evans, hereinafter referred  
to as the Bankrupt, filed a voluntary petition in  
bankruptcy with the Clerk of the above-entitled  
Court on the 27th day of February, 1950, and was  
in said petition duly adjudged bankrupt.

III.

That thereafter, at a first meeting of creditors  
duly and regularly called and held in said bank-

ruptcy proceedings, plaintiff was appointed Trustee of the estate of said bankrupt, and thereafter qualified as such Trustee by filing his bond in the penal sum set by the Court, and ever since then has been and now is the duly appointed, qualified and acting Trustee of the estate of said bankrupt.

#### IV.

That during all of the times herein mentioned, defendant was and now is a national banking association organized and existing under and by virtue of the laws of the United States of America.

#### V.

That heretofore and prior to the 15th day of September, 1948, the Bankrupt, doing business under the fictitious name of Evans Construction Co., entered into a contract with the State of California to perform work and services, and to supply goods in the construction of a public work known as the Chamberlain Creek Job; that said contract was a contract which, in the regular course, would result in an open-book account.

#### VI.

That on or about the 15th day of September, 1948, said Bankrupt assigned to defendant all moneys which were then due or which would thereafter become due to said Bankrupt from the State of California under and pursuant to the contract referred to in Paragraph V hereof.

#### VII.

That no notice of intention to assign and/or no

notice of assignment has ever been filed with the County Recorder of the County of Alameda in which County said Bankrupt maintained his principal place of business, and there are creditors of said Bankrupt who had no actual notice of said assignment.

### VIII.

That the funds in the possession of plaintiff as such Trustee in bankruptcy are insufficient to pay the claims of creditors in full; that there are creditors of said Bankrupt who were creditors of said Bankrupt at the time of the said assignment, and who became creditors of said Bankrupt subsequent to the assignment, but without notice thereof.

### IX.

That subsequent to the execution of said assignment, and pursuant thereto, the State of California paid to defendant the sum of Twenty-One Thousand Three Hundred Forty-Six Dollars and Five Cents (\$21,346.05), which said sum plaintiff demanded of defendant on the 31st day of December, 1951, but defendant has failed, refused and neglected to pay same to plaintiff.

As and for a Separate, Second and Distinct Cause of Action, Plaintiff Alleges:

### I.

Plaintiff incorporates and adopts herein by reference all of the allegations contained in paragraphs I, II, III and IV of his first cause of action.

## II.

That heretofore and prior to the 15th day of November, 1948, the Bankrupt, doing business under the fictitious name of Evans Construction Co., entered into a contract with the County of Shasta, State of California, to perform work and services, and to supply goods in the construction of a bridge over the Pitt River in said County; that said contract was a contract which, in the regular course, would result in an open-book account.

## III.

That on or about the 15th day of November, 1948, said Bankrupt assigned to defendant all moneys which were then due or which would thereafter become due to said Bankrupt from the County of Shasta, State of California, under and pursuant to the contract referred to in Paragraph II hereof.

## IV.

That no notice of intention to assign and/or no notice of assignment has ever been filed with the County Recorder of the County of Alameda in which County said Bankrupt maintained his principal place of business, and there are creditors of said Bankrupt who had no actual notice of said assignment.

## V.

That the funds in the possession of plaintiff as such Trustee in bankruptcy are insufficient to pay the claims of creditors in full; that there are creditors of said Bankrupt who were creditors of said

Bankrupt at the time of the said assignment, and who became creditors of said Bankrupt subsequent to the assignment, but without notice thereof.

## VI.

That subsequent to the execution of said assignment, and pursuant thereto, the County of Shasta, State of California, paid to defendant the sum of Fifty-Three Thousand Eight Hundred Forty-Three Dollars and Six Cents (\$53,843.06), which said sum plaintiff demanded of defendant on the 31st day of December, 1951, but defendant has failed, refused and neglected to pay same to plaintiff.

Wherefore, plaintiff, as Trustee in bankruptcy, prays judgment against defendant for the sum of Twenty-One Thousand Three Hundred Forty-Five Dollars and Five Cents (\$21,345.05) by reason of plaintiff's first cause of action, and for the sum of Fifty-Three Thousand Eight Hundred Forty-Three Dollars and Six Cents (\$53,843.06) by reason of plaintiff's second cause of action, or a total of Seventy-Five Thousand One Hundred Eighty-Eight Dollars and Eleven Cents (\$75,188.11), together with interest thereon at the rate of Seven Per Cent (7%) per annum from the 31st day of December, 1951, together with plaintiff's costs incurred herein.

SHAPRO & ROTHSCCHILD,

By /s/ AUGUST B. ROTHSCCHILD,

Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed March 31, 1952.



[Title of District Court and Cause.]

AMENDED COMPLAINT TO SET ASIDE  
TRANSFER OF ACCOUNTS RECEIVABLE

Plaintiff complains of Defendant, and, for cause of action, alleges:

I.

That the jurisdiction of the above-entitled court is based on the provisions of Section 70(e) of the Bankruptcy Act [11 USC, Sec. 110(e)].

II.

That William Jason Evans, hereinafter referred to as the Bankrupt, filed a voluntary petition in bankruptcy with the Clerk of the above-entitled Court on the 27th day of February, 1950, and was on said petition duly adjudged bankrupt.

III.

That thereafter, at a first meeting of creditors duly and regularly called and held in said bankruptcy proceedings, Plaintiff was appointed Trustee of the estate of said Bankrupt, and thereafter qualified as such Trustee by filing his bond in the penal sum set by the Court, and ever since then has been and now is the duly appointed, qualified and acting Trustee of the estate of said Bankrupt.

IV.

That during all of the times herein mentioned, Defendant was and now is a national banking association organized and existing under and by virtue of the laws of the United States of America.

## V.

That heretofore and prior to the 15th day of September, 1948, the Bankrupt, doing business under the fictitious name of Evans Construction Co., entered into a contract with the State of California to perform work and services, and to supply goods in the construction of a public work known as Chamberlain Creek Job; that said contract was a contract which, in the regular course, would result in an open-book account.

## VI.

That prior to the 15th day of September, 1948, Defendant loaned to the Bankrupt for use in performance of the above-mentioned contract the sum of \$20,000.00.

## VII.

That on or about the 15th day of September, 1948, said Bankrupt assigned to Defendant all moneys which were then due or which would thereafter become due to said Bankrupt from the State of California under and pursuant to the contract referred to in Paragraph V hereof.

## VIII.

That no notice of intention to assign and/or no notice of assignment has ever been filed with the County Recorder of the County of Alameda, in which county said Bankrupt maintained his principal place of business.

## IX.

That the funds in the possession of Plaintiff, as such Trustee in Bankruptcy, are insufficient to pay the claims of creditors in full; that there are creditors of said Bankrupt who were creditors of said Bankrupt at the time of said assignment and who had no actual notice thereof; that there are creditors of said Bankrupt who became creditors of said Bankrupt after said assignment but before collection of said accounts by Defendant without actual notice of said assignment.

## X.

That subsequent to the execution of said assignment, and pursuant thereto, the State of California paid to Defendant the sum of Twenty-One Thousand Three Hundred Forty-Six Dollars and Five Cents (\$21,346.05), which said sum Plaintiff demanded of Defendant on the 31st day of December, 1951, but Defendant has failed, refused and neglected to pay same to Plaintiff.

As and for a Separate, Second and Distinct Cause of Action, Plaintiff Alleges:

## I.

Plaintiff incorporates and adopts herein by reference all of the allegations contained in Paragraphs I, II, III and IV of his first cause of action.

## II.

That heretofore and prior to the 15th day of November, 1948, the Bankrupt, doing business under



the fictitious name of Evans Construction Co., entered into a contract with the County of Shasta, State of California, to perform work and services, and to supply goods in the construction of a bridge over the Pitt River in said County; that said contract was a contract which, in the regular course, would result in an open-book account.

### III.

That prior to the 15th day of November, 1948, Defendant loaned to the Bankrupt for use in performance of said contract the sum of \$3,300.00.

### IV.

That on or about the 15th day of November, 1948, said Bankrupt assigned to Defendant all moneys which were then due or which would thereafter become due to said Bankrupt from the County of Shasta, State of California, under and pursuant to the contract referred to in Paragraph II hereof.

### V.

That no notice of intention to assign and/or no notice of assignment has ever been filed with the County Recorder of the County of Alameda, in which county said Bankrupt maintained his principal place of business.

### VI.

That the funds in the possession of Plaintiff, as such Trustee in Bankruptcy, are insufficient to pay the claims of creditors in full; that there are creditors of said Bankrupt who were creditors of said

Bankrupt at the time of said assignment and who had no actual notice thereof; that there are creditors of said Bankrupt who became creditors of said Bankrupt after said assignment but before collection of said accounts by Defendant without actual notice of said assignment.

## VII.

That subsequent to the execution of said assignment, and pursuant thereto, the County of Shasta, State of California, paid to Defendant the sum of Fifty-Three Thousand Eight Hundred Forty-Three Dollars and Six Cents (\$53,843.06), which said sum Plaintiff demanded of Defendant on the 31st day of December, 1951, but Defendant has failed, refused and neglected to pay same to Plaintiff.

Wherefore, Plaintiff, as Trustee in Bankruptcy, prays judgment against Defendant for the sum of \$20,000.00 by reason of Plaintiff's first cause of action and for the sum of \$13,300.00 by reason of Plaintiff's second cause of action, or a total of \$33,300.00, together with interest thereon at the rate of seven per cent (7%) per annum from the 31st day of December, 1951, together with Plaintiff's costs incurred herein.

SHAPRO & ROTHCHILD,

By /s/ DANIEL R. COWANS,  
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed May 19, 1953.

[Title of District Court and Cause.]

## ANSWER TO AMENDED COMPLAINT

The defendant in answer to the amended complaint and to the first cause of action set forth therein admits, denies and alleges:

### I.

Admits the allegations set forth in paragraphs I, II, III and IV.

### II.

Admits that prior to the 15th day of September, 1948, the bankrupt entered into a written contract with the State of California to construct a public work known as the Chamberlain Creek Job, but denies that the bankrupt otherwise agreed to perform work or services for or to supply goods to the State of California, and denies that said contract was a contract which in the regular course, or at all, would result in an open, or any, book account.

### III.

Denies that prior to the 15th day of September, 1948, the defendant loaned to the bankrupt for use in performance of the above-mentioned contract, or at all, the sum of \$20,000 or any sum in connection with the Chamberlain Creek Job and, in this connection, alleges that on or about the 15th day of September, 1948, the defendant agreed to finance the bankrupt in connection with said Chamberlain Creek Job. Thereafter, defendant made the follow-

ing loans and received the following payments in connection with said job:

### Chamberlain Creek Job Loans

1—September 16, 1948.....	No. 5916	\$ 3,000.00
2—September 21, 1948.....	No. 5959	2,000.00
3—October 2, 1948.....	No. 6075	1,000.00
4—October 11, 1948.....	No. 6118	3,000.00
5—October 23, 1948.....	No. 6141	2,000.00
6—October 30, 1948.....	No. 6296	1,500.00
7—November 8, 1948.....	No. 6344	1,500.00
8—November 15, 1948.....	No. 6400	2,000.00
9—November 22, 1948.....	No. 6460	700.00
10—November 29, 1948.....	No. 6526	500.00
11—December 4, 1948.....	No. 6594	400.00
12—December 13, 1948.....	No. 6679	1,200.00
13—December 20, 1948.....	No. 6794	1,500.00
Total .....		<hr/> \$20,300.00

### Payments

1—October 11, 1948.....	\$ 5,445.00
(Notes 1 & 2 & \$445 on account, note 3 with \$18.33 interest.)	
2—November 16, 1948.....	\$ 888.10
(On account note 7.)	
3—December 13, 1948.....	\$ 6,666.90
(Notes 4, 5, 10 and balance notes 3 & 7 with \$30.83 interest.)	
4—December 20, 1948.....	
(Balance due renewed by note No. 6747—\$7,300.00 and \$29.56 interest paid.)	
5—January 6, 1949.....	\$ 3,785.76
(On account note No. 6747.)	
6—March 22, 1949.....	\$ 1,834.51
(On account note No. 6747.)	
7—April 7, 1949.....	\$ 1,679.73
(Balance with \$69.09 interest.)	
Total .....	<hr/> \$20,300.00

## IV.

Admits that on or about the 15th day of September, 1948, bankrupt assigned to defendant all monies then due, or thereafter to become due, from the State of California in connection with the Chamberlain Creek Job and in this connection alleges that the bankrupt had prior thereto assigned all of said monies to the Glens Falls Indemnity Company which on or about September 15, 1948, consented to the assignment to defendant in consideration of the deposit of all monies received under such assignment in a joint-control account to be withdrawn only upon an authorized signature of the bankrupt countersigned by a designated officer or agent of Glens Falls Indemnity Company and the monies thereafter received from the State of California with the exception of a payment on January 6, 1949, in the amount of \$3,785.76, were deposited in said joint-control account and said payment of January 6, 1949, was applied on account of note No. 6747 listed above.

## V.

Admits that no notice of intention to assign or notice of assignment was filed with the county recorder of the County of Alameda in connection with the assignment to the defendant of monies due or to become due on the Chamberlain Creek Job, but denies that any such notice of intention to assign or notice of assignment was at any time herein mentioned required by any law of the United States or of the State of California.



## VI.

Alleges that it is without knowledge or information sufficient to form a belief as to the truth of any averment set forth in paragraph IX and basing its denial on that ground denies each of said averments generally and specifically; and further denies that there are any creditors of the bankrupt who now are or at any time have been in a position to question the validity of the aforesaid assignment or of any payments received by defendant thereunder.

## VII.

Admits that the State of California paid to defendant the sum of \$21,346.05 in connection with said Chamberlain Creek Job and that plaintiff demanded said sum from defendant on or about the 31st day of December, 1951; and admits that the defendant has failed and refused to pay said sum to plaintiff, but denies that defendant neglected to pay said sum to plaintiff or that said sum or any part thereof is due or owing from the defendant to plaintiff or to any creditor of the bankrupt.

As a further and separate defense to the first cause of action, the defendant alleges that the assignment of the monies due or to become due to the bankrupt under the contract for the Chamberlain Creek Job and the payment of monies thereunder to the defendant were at the most only preferential, and the first cause of action is barred by Section 60 (a) of the Bankruptcy Act.

The Defendant in Answer to the Second Cause of Action Admits, Denies and Alleges:

I.

Admits the allegations of paragraphs I, II, III and IV of the first cause of action which are incorporated and adopted by reference as paragraph I of the second cause of action.

II.

Admits that prior to the 15th day of November, 1948, the bankrupt entered into a contract with the County of Shasta, State of California, to construct a bridge over the Pitt River, which contract is sometimes referred to as the Pittville Job; but denies that the bankrupt otherwise agreed to perform work or services for or supply goods to the County of Shasta and denies that said contract was a contract which in the regular course of business, or at all, would result in an open, or any book account.

III.

Admits that prior to the 15th day of November, 1948, the defendant loaned to the bankrupt for use in the performance of said contract the sum of \$3,500 and alleges that said sum was repaid by the bankrupt on November 8, 1948, and prior to the assignment hereinafter mentioned.

IV.

Admits that on or about the 15th day of November, 1948, the bankrupt assigned to the defendant all monies due or to become due to the bankrupt

from the County of Shasta under and pursuant to the contract heretofore mentioned and, in this connection, the defendant alleges that from and after the 15th day of November, 1948, the defendant made the following loans to and received the following payments from the bankrupt in connection with the Pittville Job:

### Pittville Job

#### Loans

1—October 23, 1948.....	No. 6140	\$ 2,000.00
2—October 30, 1948.....	No. 6297	1,500.00
3—November 8, 1948.....	No. 6345	1,000.00
4—November 15, 1948.....	No. 6402	3,000.00
5—November 22, 1948.....	No. 6462	1,000.00
6—November 29, 1948.....	No. 6527	1,000.00
7—December 4, 1948.....	No. 6595	1,000.00
8—December 20, 1948.....	No. 6748	2,500.00

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Total .....\$13,000.00

#### Payments

November 8, 1948.....	\$3,500.00
(Notes 1 & 2 and interest of \$6.92.)	
December 13, 1948.....	\$7,000.00
(Notes 3, 4, 5, 6 & 7 and interest of \$26.50.)	
January 8, 1949.....	\$2,500.00
(Note 8 and \$7.92 interest.)	

### V.

Admits that no notice of intention to assign or notice of assignment was filed with the county recorder of the County of Shasta in connection with the assignment to the defendant of monies due or to become due on the Pittville Job, but denies that any such notice of intention to assign or notice of



assignment was at any time herein mentioned required by any law of the United States or of the State of California.

## VI.

Alleges that it is without knowledge or information sufficient to form a belief as to the truth of any averment set forth in paragraph VI and basing its denial on that ground denies each of said averments generally and specifically; and further denies that there are any creditors of the bankrupt who now are or at any time have been in a position to question the validity of the aforesaid assignment or of any payments received by defendant thereunder.

## VII.

Denies that subsequent to the execution of the assignment mentioned herein and pursuant thereto the County of Shasta paid to the defendant the sum of \$53,843.06 or any sum in excess of \$53,428.68, but admits that on or about the 31st day of December, 1951, the plaintiff demanded said sum of \$53,843.06 from the defendant, which defendant has failed and refused to pay to plaintiff; but denies that defendant neglected to pay sum to plaintiff or that said sum or any part thereof is now due or owing from defendant to plaintiff or to any creditor of the bankrupt.

As a further and separate defense to the second cause of action the defendant alleges that the assignment of the monies due, or to become due, to the bankrupt under the contract for the Pittville Job

and the payment of monies thereunder to the defendant were at the most only preferential, and the second cause of action is barred by section 60 (a) of the Bankruptcy Act.

Wherefore, defendant prays that plaintiff take nothing by reason of the amended complaint or either cause of action set forth therein and that the defendant have judgment for costs of suit herein and such other and further relief that may be proper in the premises.

SAMUEL B. STEWART, JR.,  
CHRISTOPHER M. JENKS,  
H. H. BECHTEL,

By /s/ CHRISTOPHER M. JENKS,  
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed July 1, 1953.

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[Title of District Court and Cause.]

### PRETRIAL ORDER

The above-entitled matter having regularly come on for pretrial conference before the above-entitled Court on the 14th day of October, 1954, the above-named plaintiff being represented by Messrs. Shapro & Rothschild (Arthur P. Shapro, Esq., appearing), his attorneys, and the defendant being represented by Christopher M. Jenks, Esq., one of its attorneys,

and after proceedings had and with the consent of counsel for the respective parties, it was stipulated that the Court might make and enter herein the following Order after said pretrial of the above-entitled action; and good cause appearing therefor,

It Is Hereby Ordered as follows:

1. That the figure \$3,300.00 appearing on line 4, page 4 of plaintiff's Amended Complaint to Set Aside Transfer of Accounts Receivable may be deemed amended by inserting in lieu thereof the figure \$13,000.00.

2. That the figure \$20,000.00 appearing on line 1, page 5 of plaintiff's Amended Complaint to Set Aside Transfer of Accounts Receivable may be deemed amended by inserting in lieu thereof the figure \$20,300.00

3. That the figure \$13,300.00 appearing on line 2, page 5 of plaintiff's Amended Complaint to Set Aside Transfer of Accounts Receivable may be deemed amended by inserting in lieu thereof the figure \$13,000.00.

4. That the contract referred to in paragraph V of the First Count of Plaintiff's said Amended Complaint between Evans Construction Co. and the State of California shall be supplied to the Court upon the trial of this cause in form acceptable to counsel for the respective parties.

5. That a photostatic copy of the assignment referred to in paragraph VII of plaintiff's said

Amended Complaint be furnished to plaintiff's counsel by defendant and that same may be admitted in evidence upon the trial of this cause subject to objections thereto only as to the competency, relevancy and/or materiality of said document.

6. That photostatic copies of six State warrants which constituted the payments, referred to in paragraph VII, page 4 of defendant's Answer to Amended Complaint as Amended, may be admitted in evidence at the trial of this cause on behalf of defendant. Said warrants are described as follows:

Date	Number	Amount
Oct. 4, 1948.....	B 26931	\$5,445.00
Nov. 8, 1948.....	H-41773	839.25
Dec. 9, 1948.....	R 1539	6,720.00
Dec. 31, 1948.....	R 7025	3,785.76
Feb. 25, 1949.....	R 21555	2,834.51
Apr. 1, 1949.....	776	1,721.53

7. That photostatic copies of nine Shasta County warrants which constituted the payment referred to in paragraph VII, page 7 of defendant's Answer to Amended Complaint as Amended, may be admitted in evidence at the trial of this cause on behalf of defendant. Said warrants are described as follows:

Date	Number	Amount
Nov. 4, 1948.....	2035	\$ 3,747.64
Dec. 9, 1948.....	2494	8,380.50
Jan. 6, 1949.....	3127	7,096.03
May 5, 1949.....	5420	18,745.31
June 9, 1949.....	5932	12,073.16
July 8, 1949.....	88	1,788.99
July 29, 1949.....	12164	4,994.69
Sept. 10, 1949.....	530	350.00
November 23, 1949.....	621	414.38

8. Manual copies of the defendant's ledger sheets for the account entitled "Evans Construction Co., Special Account, Countersignature Required, 2035 Ashby Ave., Berkeley 3, Calif." covering the period from September 16, 1948, to April 11, 1949, may be admitted in evidence at the trial of this cause on behalf of defendant.

9. Manual copies of the defendant's ledger sheets for the account entitled "Evans Construction Co., 2035 Ashby Ave., Berkeley, Calif." covering the period from October 11, 1948, to July 18, 1949, may be admitted in evidence at the trial of this cause on behalf of defendant.

10. That the prior assignment to Glens Falls Indemnity Company referred to in paragraph IV on page 3 of defendant's Answer to Amended Complaint may be received in evidence on behalf of the defendant in the regular blank form thereof supplied and used by said Glens Falls Indemnity Company, unless at the time of the trial of this cause, the actual original of said Assignment from the Bankrupt to said Glens Falls Indemnity Company dated September 15, 1948, shall be available.

11. That within ten (10) days from and after the date hereof defendant may file herein an amendment to the paragraph numbered VII of both counts of its Answer herein.

Dated at San Francisco in said District this 8th day of August, 1955.

/s/ OLIVER J. CARTER,  
District Judge.



Approved:

SAMUEL B. STEWART,  
GEORGE CHADWICK, JR., and  
H. H. BECHTEL,

By /s/ GEORGE CHADWICK, JR.,  
Attorneys for Defendant.

[Endorsed]: Filed August 8, 1955.

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[Title of District Court and Cause.]

### SUBSTITUTION OF ATTORNEY

The defendant, Bank of America National Trust and Savings Association, a national banking association, hereby substitutes George Chadwick, Jr., 300 Montgomery Street, San Francisco 4, California, as one of its attorneys in the above-entitled action in the place and stead of Christopher M. Jenks.

Dated: August 3, 1955.

BANK OF AMERICA NATIONAL TRUST AND  
SAVINGS ASSOCIATION,

By /s/ E. A. IVERSEN,  
Assistant Vice President.

I hereby consent to the substitution of George Chadwick, Jr., as an attorney for the defendant, Bank of America National Trust and Savings Association, a national banking association, in the above-entitled action in my place and stead.

Dated: August 3, 1955.

/s/ CHRISTOPHER M. JENKS.

I hereby agree to be substituted in the place of Christopher M. Jenks in the above-entitled action as an attorney for the defendant, Bank of America National Trust and Savings Association.

Dated: August 3, 1955.

/s/ GEORGE CHADWICK, JR.

[Endorsed]: Filed August 11, 1955.

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[Title of District Court and Cause.]

AMENDMENT TO ANSWER TO AMENDED  
COMPLAINT

The defendant above named, after leave of the court first had and obtained, amends its Answer to Amended Complaint on file herein in the following particulars:

I.

Paragraph VII of defendant's answer to plaintiff's first cause of action, consisting of lines 14 through 30 on page 4 of the Answer to Amended Complaint, is amended to read as follows:

"Admits that the State of California paid the sum of \$21,346.05 in connection with said Chamberlain Creek Job and alleges that all of said sum was deposited in the joint-control account described in

Paragraph IV above, except for the sum of \$3,785.76 which was applied on account of note No. 6747; admits that plaintiff demanded the sum of \$21,346.05 from defendant on or about the 31st day of December, 1951, and that defendant has failed and refused to pay said sum to plaintiff, but denies that defendant neglected to pay said sum to plaintiff or that said sum or any part thereof is due or owing from the defendant to the plaintiff or to any creditor of the bankrupt.

“As a further and separate defense to the first cause of action, the defendant alleges that the assignment of money due or to become due the bankrupt under the contract for the Chamberlain Creek Job and the payment of monies thereunder as above alleged were at most only preferential and the first cause of action is barred by § 60(a) of the Bankruptcy Act.”

## II.

Paragraph VII of defendant's answer to plaintiff's second cause of action, consisting of lines 7 through 25 on page 7 of the Answer to Amended Complaint, is amended to read as follows:

“Denies that subsequent to the execution of the assignment mentioned herein or pursuant thereto, the County of Shasta paid to the defendant the sum of \$53,843.06, or any sum in excess of \$51,831.63, and in this connection alleges that all of said payments were deposited in the account of Evans Construction Co.; admits that on or about the 31st day of December, 1951, the plaintiff demanded said sum



of \$53,843.06 from the defendant, which defendant has failed and refused to pay to plaintiff; but denies that defendant neglected to pay said sum to plaintiff, or that said sum or any part thereof is now due or owing from the defendant to plaintiff or to any creditor of the bankrupt.

“As a further and separate defense to the second cause of action, the defendant alleges that the assignment of monies due, or to become due, to the bankrupt under the contract for the Pittville Job and the payment of monies thereunder as above alleged were at most only preferential and the second cause of action is barred by § 60(a) of the Bankruptcy Act.”

Dated: August 3, 1955.

SAMUEL B. STEWART,  
GEORGE CHADWICK, JR.,  
H. H. BECHTEL,

By /s/ GEORGE CHADWICK, JR.

[Endorsed]: Filed August 11, 1955.

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[Title of District Court and Cause.]

## OPINION AND ORDER FOR JUDGMENT

Goodman, District Judge.

This is an action pursuant to Section 70(e) of the Bankruptcy Act [11 USC § 110(e)], by the Trustee of the estate of a bankrupt, William Jason

Evans, doing business as Evans Construction Company. The Trustee seeks to recover from the defendant, Bank of America, \$20,300.00 collected by the Bank as assignee of the payments to become due the Evans Construction Company under a contract with the State of California for the construction of a bridge. The assignment to the Bank was made on September 15, 1948, to secure loans to be made by the Bank to Evans Construction Company to enable it to complete the bridge. As payments were received by the Bank pursuant to the assignment, it applied them to the loans made to the Construction Company until all of the loans were repaid on April 7, 1949. Nearly a year later, on February 27, 1950, Evans filed the voluntary petition on which he was adjudged a bankrupt.

Section 70(e) of the Bankruptcy Act provides in part that "A transfer made \* \* \* by a debtor adjudged a bankrupt under this Act which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor." The Trustee contends that the assignment made by the bankrupt to the Bank of America is voidable under Section 3019 of the California Civil Code by creditors having provable claims in the bankruptcy proceedings. Section 3019, as it read at the time of the assignment in 1948, provided that unless recorded in the manner specified therein, "no assignment of an account shall be

valid as against present or future creditors of the assignor without notice of such assignment or as against a subsequent purchaser or assignee of such account without notice of such assignment." It is conceded that the assignment here was never recorded.

Since all of the issues tendered by this cause turn upon the interpretation of California Civil Code 3019, as it read in 1948, in conjunction with related Code Sections 3017, 3018 and 3020-29, a preliminary consideration of the history and purpose of these statutory provisions is appropriate. All of these Code Sections were enacted in 1943 to aid the flourishing business of non-notification financing of accounts receivable. When accounts receivable are financed on a non-notification basis, the accounts are assigned as collateral for a loan upon the mutual understanding between the assignor and the assignee that the account debtor will not be notified of the assignment. Generally, the assignor, himself, is entrusted with the collection of the account on behalf of the assignee.

Prior to 1943, lending agencies financing receivables on a non-notification basis in California had to rely on the integrity of the assignor, since California was one of the minority of jurisdictions following the rule of *Dearle vs. Hall*<sup>1</sup> that notification to the account-debtor is necessary to perfect an assignment against a subsequent assignee for value

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<sup>1</sup>3 Russ. 1, 48, 38 Eng. Rep. 475 (1828).

without notice.<sup>2</sup> But, these lenders did not have to rely on the continued solvency of the assignor since notification of the account debtor was not necessary to perfect the assignment against the assignor's creditors.<sup>3</sup>

But, in 1943, the United States Supreme Court in *Corn Exchange National Bank vs. Klauder*, 318 U.S. 434, interpreted Section 60(a) of the Bankruptcy Act in a manner which made the security value of an account assigned on a non-notification basis dependent upon the continued solvency of the assignor. The effect of the Supreme Court's decision was that any assignment was voidable as a preferential transfer in the event of the assignor's subsequent bankruptcy unless it had been perfected both against his creditors and against subsequent assignees more than four months prior to bankruptcy or unless it had been perfected against both his creditors and subsequent assignees at the time it was made and was made for a contemporaneous consideration. Since assignments could never be perfected against subsequent assignees in California without notifying the account debtor, this decision made accounts assigned on a non-notification basis worthless as security in the event of the subsequent insolvency and bankruptcy of the assignor.

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<sup>2</sup>*Graham Paper Co. vs. Pembroke*, 124 Cal. 117, 56 Pac. 627 (1899); *City of Los Angeles vs. Knapp*, 7 Cal. 2d 168, 171, 60 P. 2d 127, 129 (1936).

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<sup>3</sup>*Walling vs. Miller*, 15 Cal. 38 (1860); *McIntyre vs. Hauser*, 131 Cal. 11, 63 Pac. 69 (1900).

The California legislature immediately came to the aid of non-notification financing by enacting Civil Code Sections 3017-29, substituting recording of the assignment for notification to the account debtor as the means of perfecting the assignment against subsequent assignees.<sup>4</sup> It is thus apparent that these Code Sections were prompted by the desire of the legislature to enable lenders engaged in non-notification financing to eliminate the risk that assignments taken as security might later be voided as preferential transfers.<sup>5</sup> It is also clear that the legislature intended this recording statute to accomplish a second purpose; namely, to protect creditors of assignors and subsequent assignees against secret assignment. For, had the legislature merely wished to dispel the cloud cast upon non-notification financing by the *Klauder* decision, it need only to have provided that assignments became perfected against subsequent assignees when made. And, it need not have provided that recording should be the

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<sup>4</sup>1943 Stats. 2542. Various amendments have since been made. 1945 Stats. 756 amended Sections 3017-22 and 3024. 1947 Stats. 2479 amended Section 3022. 1951 Stats. 3171 amended Section 3017-19. 1953 Stats. 2805 again amended Section 3017.

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<sup>5</sup>For a full discussion of non-notification financing of receivables, the impact of the *Klauder* decision, and the State legislation enacted to counteract that decision see Koessler, "Assignment of Accounts Receivable," 33 *California Law Review* 40 (1945). See also the comment on the enactment of the California statute in 17 *Southern California Law Review* 303 (1944).



means of perfecting an assignment of an account against creditors of the assignor. For, theretofore assignments were perfected against the assignor's creditors when made.

There is then a dual legislative purpose to be considered in resolving the problems of statutory interpretation tendered. The first of these problems arises from the contention of defendant Bank that the receivables assigned to it did not constitute an account within the meaning of Civil Code Section 3019. At the time of the assignment, the term "account" as used in Section 3019 was defined in Section 3017 as follows: "'Account' means an open-book account, mutual account, or account stated, due or to become due, carried in the regular course of business, and not represented by a judgment, note, draft, acceptance, or other instrument for the payment of money; it includes rights under an unperformed contract for work, goods, or services which in the regular course will result in an open-book account."

It would appear that the right assigned to defendant to receive the payments due the bankrupt under the construction contract constitutes an account as described by the last clause of the statutory definition. But, defendant urges that it does not because it is claimed that an express written contract such as that between the bankrupt and the State of California can never result in an open-book account except by specific agreement of the parties. In

support of this claim, defendant cites numerous cases in which open-book accounts were distinguished from other types of indebtedness for the purpose of determining the appropriate statute of limitations.<sup>6</sup> These cases quite reasonably held that a written contract could not ordinarily result in an open-book account which could be the basis of an independent cause of action, apart from the contract, so that a suitor might avoid the bar of the statute of limitation applicable to suits on a written contract.

It is not logical to suppose that the legislature intended that open-book accounts should be judged by the same standards in determining the applicability of the recording statute as they would be in determining the appropriate statute of limitation. The last clause of Section 3017 obviously contemplates that an open-book account may arise in the regular course out of a contract, either oral or written. Indeed, it is likely that that clause was inserted in Section 3017 to make clear that the term "open-book account" was not to have the restricted meaning given it in the Statute of limitation cases. The holdings in those cases were based upon entirely different considerations of policy than those which

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<sup>6</sup>*Parker vs. Shell Oil Co.*, 29 Cal. 2d 503, 175 P. 2d 838 (1946); *Tillson vs. Peters*, 41 Cal. App. 2d 671, 107 P. 2d 434 (1940); *Lee vs. DeForest*, 22 Cal. App. 2d 351, 71 P. 2d 285 (1937); *Stewart vs. Claudius*, 19 Cal. App. 2d 349, 65 P. 2d 933 (1937); *Mercantile Trust Co. vs. Doe*, 26 Cal. App. 246, 146 Pac. 692 (1914).

entered into the drafting of the recording statute. As has been noted, the recording statute was enacted both to aid and to regulate non-notification financing of accounts receivable. Consequently, it is reasonable to assume the legislature intended the statute to encompass the types of accounts receivable likely to be financed on a non-notification basis.<sup>7</sup> Certainly, the mere fact that rights to receive payment for goods or services might have arisen from a written contract would not mean that the account debtor would necessarily be notified of their assignment.

In my opinion the term "open-book account" was used in the statute in the ordinary business sense of an indebtedness primarily evidenced or reflected by debit and credit entries in an account book. The construction contract between the State of California and the bankrupt normally would have and in fact did result in such an account. The contract provided for payment on a unit basis for the work done and materials furnished by the bankrupt. The bankrupt was entitled to progress payments based upon estimates of completed work made by State engineers. Appropriate entries were made in accounts main-

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<sup>7</sup>See the discussion of the purpose of the recording statute in relation to the statutory definition of "account" in *Durkin vs. Durkin*, 133 C.A. 2d 283, 284 P. 2d 185 (1955). In that case the appellate court approved a holding, on facts substantially different from those in the present case, that an assigned account was not an "account" as defined in Civil Code Section 3017.



tained by the bankrupt, when these estimates were made, and again when payment was made by the State. The amount which had fallen due under the contract could not have been determined from the contract itself. Thus the accounts were more than a mere memorandum of the payments made which had been made on an indebtedness fixed by the terms of the contract. They were the primary evidence of the current indebtedness of the State to the bankrupt.

Defendant Bank next contends that even if the receivables assigned to it did fall within the general statutory description of an "account," they were excluded from the statutory definition by the proviso that an "account" should not be represented by "a judgment, note, draft, acceptance, or other instrument for the payment of money." In support of this argument, defendant cites *In re Richards*, 108 F. Supp. 259 (S.D. Calif. 1952) in which the Court held that an account arising out of a written contract was represented by an instrument for the payment of money. I cannot agree with the conclusion reached in that case. In my opinion, the term "other instrument for the payment of money" as used in the statute must be interpreted in the light of the specifically enumerated instruments, "judgment, note, draft and acceptance." A contract does not have the distinctive attributes of such instruments.<sup>8</sup>

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<sup>8</sup>For a comment questioning the holding in *In re Richards*, see 41 California Law Review 333 (1953).

Defendant also notes that the statutory definition of “account” was amended in 1953.<sup>9</sup> The amended definition provides that “ ‘Account’ does not include any debt arising under a contract for a work of improvement to real property as defined in Section 1182 of the Code of Civil Procedure or a public work of improvement as defined in Section 4200 of the Government Code.” The receivables assigned to defendant Bank would thus not be an “account” as presently defined. It is argued that the present definition does not represent a substantive change in the previous definition, but merely a clarification of language. The amendment is far too detailed and extensive to be a mere clarification. Moreover, ample reason existed in 1953 for a substantive change in the definition of “account.” A 1950 amendment to Section 60(a) of the Bankruptcy Act had eliminated the risk that an assignment might be voided by a trustee in bankruptcy as a preferential transfer merely because it had not been perfected against a subsequent assignee.<sup>10</sup> Thus when the recording statute was amended in 1953 it was no longer needed to enable lenders engaged in non-notification financing to render assignments invulnerable to attack by trustees in bankruptcy. It remained only as a protection for subsequent assignees and the assignor’s creditors against secret

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<sup>9</sup>1953 Stats. 2805.

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<sup>10</sup>64 Stat. 24. See House Report 1293, 81st Cong., 2nd Session., 1950 U.S. Code Congressional Service 1985.

assignments. The legislature may have felt that this single purpose could be accomplished without requiring recordation of assignments of the types of receivables excluded from the statutory definition of "account" by the 1953 amendment.

Since the receivables assigned to defendant Bank constituted an account within the meaning of former Civil Code Sections 3017 and 3019, the failure to record the assignment rendered it invalid against creditors of the assignor. But, this conclusion is not dispositive of this cause. Defendant Bank contends that even though the assignment itself was not perfected against the assignor's creditors, neither they nor the trustee in bankruptcy can recover payments actually received by the Bank as a consequence of the assignment. Two alternative grounds are asserted in support of this contention. The first is that the payments received by the Bank were not collected directly from the bankrupt and thus were not received by the Bank under the assignment.<sup>11</sup> The second is that the recording statute merely prevents an assignee from asserting an unrecorded assignment against creditors of the assignor seeking to reach outstanding accounts receivable, and does not entitle creditors to recover from the assignee actual collections on assigned accounts.

The first ground has no merit. Without relating

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<sup>11</sup>It is not disputed, however, that one payment received by the Bank was received directly from the State. This argument, therefore, has no application to that payment.

all of the facts concerning the receipt of payments by the Bank, it is fair to say that the Bank had control of payments made by the State for work done under the construction contract from the moment the payments were made. Moreover, if the recording statute does permit creditors to recover from an assignee amounts collected as a consequence of unrecorded assignments, it seems clear that the fact that the assignor may have collected from the account debtor and in turn paid the assignee does not alter the situation. It has been noted that the recording statute is concerned with the financing of accounts receivable on a non-notification basis. And, when this type of financing is engaged in, it is expected that the assignor may collect from the account debtor on behalf of the assignee. It is also apparent from the content of the recording statute that it was designed to encompass this situation. That portion of the statute contained in Civil Code Section 3025 provides, among other things, that the assignor of an account shall be a trustee for the assignee of any proceeds of the account collected by the assignor.<sup>12</sup>

However, in my opinion, defendant Bank is correct in its claim that the recording statute does not enable creditors of the assignor of an unrecorded assignment to recover from the assignee sums actually collected pursuant to the assignment. In support of the contention that the statute does per-

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<sup>12</sup>See the comment on Section 3025 in 17 Southern California Law Review 303 at 307 (1944).



mit such recovery, the Trustee relies principally upon the case of *Menick vs. Carson*, 96 F. Supp. 817 (S.D. Calif. 1951) which so holds.<sup>13</sup> In that case the court pointed out that one of the purposes of the statute is "to prevent secret liens and transfers which deceive a creditor who extends or continues credit on the basis of the debtor's financial position." Then the Court stated that "If the debtor secretly assigns his accounts and a creditor extends credit in reliance on the possession of the debtor of the accounts, the creditor has been deluded and may set aside the assignments. To say that the assignee may avoid this result by merely collecting the accounts is to present him with a device which would practically make the statute a nullity."<sup>14</sup>

In my opinion, the Court's conclusion is the result of an insufficient consideration of the practical aspects of the extension of credit in reliance on the debtor's possession of accounts receivable. Accounts receivable are constantly fluctuating assets. Any creditor is aware that an account will not ordinarily remain outstanding indefinitely, but in the normal course of business will be paid. Upon col-

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<sup>13</sup>The Trustee also notes a decision made by Judge Roche of this Court, without opinion, in *Costello vs. H. B. Paint Co.*, Civil No. 30569, April 15, 1952. But, that decision, unexplained by any opinion, has no precedential significance here, since in that case the collections on the assigned account were made after the adjudication in bankruptcy. Thus considerations not present in this case may have entered into Judge Roche's decision.

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<sup>14</sup>96 F. Supp. 817 at 819.

lection of the account, the debtor is free to dispose of the proceeds as he may see fit. When he has done so, his creditors cannot reach the proceeds unless perhaps as a preferential transfer if bankruptcy follows within four months. Credit is rarely extended in reliance on any particular accounts receivable, but rather on the amount of receivables which a business of a particular size and character may be expected to have continually outstanding. All that creditors can reasonably expect is to reach such outstanding accounts in the event of the debtor's insolvency or bankruptcy. The protection they need is against prior secret liens which will prevent them from sharing these assets of the debtor. As interpreted by the Court in *Menick*, the recording statute would do more than protect against secret assignments. It would place the assignor's creditors in a far more favorable position than if the assignment had never been made. The sums collected by the assignee pursuant to an unrecorded assignment would remain as sort of a perpetual fund on which prior creditors of the assignor could draw in the event of his eventual default on his debts to them. I do not believe the framers of the California recording statute ever intended such a result.

The language of the statute does not require it. At the time of the assignment, Civil Code Section 3019 merely stated that no unrecorded assignment of an account "shall be valid" as against creditors of the assignor or subsequent assignee, without



notice. On its face, this language means no more than that an unrecorded transfer of an account is ineffective against such creditors and subsequent assignees. Once the account is paid, however, it is extinguished. The fact that the account, itself, was never effectively transferred as against the assignor's creditors or subsequent assignees does not mean that the proceeds could not be.

It may be said that the recording statute was intended to protect not only the assignor's creditors but also subsequent assignees who can only be adequately protected by enabling them to recover sums collected by a prior assignee who did not record his assignment. This may be true. But, if the recording statute was intended to afford such protection to subsequent assignees, provisions of the statute other than Civil Code 3019 more reasonably spell out that intent. At the time of the assignment herein, Civil Code, Section 3018, established the relative priorities of the competing assignees, stating that the first in time should take precedence, except that if any of the assignments were recorded, the assignee who first recorded should have priority. It would be a fair interpretation of this provision, to say that an assignee with priority could recover from another assignee collections on the assigned account. To so interpret Section 3018 would result in a more logical application of the recording statute than to hold that such recovery would be permissible merely because an assignment was invalid under Section 3019. For if that were true, a

subsequent assignee who had never troubled to record his own assignment would be able to recover collections on the account made by the prior assignee. There would be no justification for so favoring the second assignee.<sup>15</sup>

Since at the time of the filing of the petition in bankruptcy, the account assigned by the bankrupt to defendant was no longer outstanding, and Civil Code Section 3019 did not entitle the bankrupt's creditors to recover the proceeds from defendant, the Trustee has no cause of action under Section 70(e) of the Bankruptcy Act. Judgment will therefore enter in favor of defendant upon findings presented pursuant to the Rules.

Dated: April 11, 1956.

/s/ LOUIS E. GOODMAN,

United States District Judge.

[Endorsed]: Filed April 12, 1956.

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<sup>15</sup>The California recording statute from the beginning set forth the rights of competing assignees of the same account in a very ambiguous manner. See the comments in 33 Southern California Law Review 303 at 309 (1944); 33 California Law Review 308 (1950). Apparently many of the numerous amendments to the statute were made in an attempt to clear up these ambiguities. However, a careful appraisal of these amendments in the light of the purpose of the recording statute makes it clear that the original provision of Section 3019 that an unrecorded assignment is not valid against a subsequent assignee, whatever it meant, certainly did not mean that a junior assignee could recover the proceeds of the account actually collected by a senior assignee who did not record his assignment.

[Title of District Court and Cause.]

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

The above-entitled cause having been tried and submitted for decision, the Court now finds as follows:

1. William Jason Evans (hereinafter referred to as Bankrupt) was adjudicated a bankrupt on February 27, 1950, and plaintiff was thereafter appointed, and now is, trustee of the Estate of said bankrupt.

2. For some time prior to September 15, 1948, Bankrupt had been engaged in the construction business under the name of Evans Construction Company, and defendant Bank of America National Trust and Savings Association, a national banking association, (hereinafter called Bank), had from time to time, through its Berkeley Main Office, engaged in financing Bankrupt in his construction business.

3. On or about September 15, 1948, Bankrupt entered into a contract with the State of California, Department of Public Works, Division of Highways, to construct a bridge across Chamberlain Creek in Mendocino County. (Plaintiff's Exhibit 1.)

4. On September 15, 1948, Bankrupt executed an assignment to Bank of all monies due or to become due under the contract. The assignment was given to secure Bank for loans to be made to Bankrupt to

enable him to perform the contract. (Plaintiff's Exhibit 4.)

5. Glens Falls Indemnity Company, which had an assignment prior to that of Bank, by letter subordinated its rights thereunder to the rights of Bank under its assignment of September 15, 1948. (Plaintiff's Exhibit 5.)

6. No notice of intention to assign and no notice of assignment of said contract has ever been filed with the County Recorder of the County of Alameda, in which county Bankrupt maintained his principal place of business, or in any other county or at all.

7. Thereafter, Bank made the loans and advances upon the security of the assignment as follows on the following dates and in the following amounts:

No.	Notes	
1—September 16, 1948.....	No. 5916	\$ 3,000.00
2—September 21, 1948.....	No. 5959	2,000.00
3—October 2, 1948.....	No. 6075	1,000.00
4—October 11, 1948.....	No. 6118	3,000.00
5—October 23, 1948.....	No. 6141	2,000.00
6—October 30, 1948.....	No. 6296	1,500.00
7—November 8, 1948.....	No. 6344	1,500.00
8—November 15, 1948.....	No. 6400	2,000.00
9—November 22, 1948.....	No. 6460	700.00
10—November 29, 1948.....	No. 6526	500.00
11—December 4, 1948.....	No. 6594	400.00
12—December 13, 1948.....	No. 6679	1,200.00
13—December 20, 1948.....	No. 6794	1,500.00
Total .....		<hr/> \$20,300.00

Bankrupt maintained a regular set of books, including account receivable ledger in which, and on the Chamberlain Creek job account, were entered from time to time sums becoming due from the State of California for progress payments, and in which payment of such sums was also from time to time entered.

9. The State of California drew, issued, and delivered to Bank payments on account of said contract on the following dates and in the following amounts:

October 6, 1948.....	\$ 5,445.00
November 12, 1948.....	839.25
December 9, 1948.....	6,720.00
January 6, 1949.....	3,785.76
March 22, 1949.....	2,834.51
April 7, 1949.....	1,721.53
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Total .....	\$21,346.05

Each of said warrants was made payable to "Bank of America NTS&SA assignee of Evans Construction Company" and was upon presentation duly paid.

10. Each of the warrants, except that of January 6, 1949, was deposited by Bank in the account at Bank entitled "Evans Construction Company, Special Account."

11. The loans and advances made by Bank were repaid from proceeds of the said assigned contract between Bankrupt and State of California.



1—October 11, 1948.....	\$ 5,445.00
(Notes 1 & 2 & 445 on account note with \$18.33 interest.)	
2—November 16, 1948.....	888.10
(On account note 7.)	
3—December 13, 1948.....	6,666.90
(Notes 4, 5, 10 and balance notes 3 & 7 with \$30.83 interest.)	
4—December 20, 1948.....	
(Balance due renewed by note No. 6747—\$7,300.00 and \$29.56 interest paid.)	
5—January 6, 1949.....	3,785.76
(On account note No. 6747.)	
6—March 22, 1949.....	1,834.51
(On account note No. 6747.)	
7—April 7, 1949.....	1,679.73
(Balance with \$69.09 interest.)	
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Total .....	\$20,300.00

12. Payments 1, 2, 3 and 4 above were by means of checks drawn by Bankrupt upon the "Evans Construction Company, Special Account." Payment 5 above was made by Bank negotiating a State of California Warrant dated January 6, 1949, and crediting the proceeds on account of note #6747. Payments 6 and 7 above were effected by Bank charging (debiting) the "Evans Construction Company, Special Account."

13. At the time of all of the transactions herein mentioned, and on September 15, 1948, Bankrupt had creditors who have filed proofs of claim in the bankruptcy proceedings, and who had no actual notice of the assignment by Bankrupt to Bank of monies to become due Bankrupt from the State of California under the contract.



From the foregoing findings of fact, the **Court** now makes the following conclusions of law:

1. The assignment of Bankrupt to Bank of September 15, 1948, was the assignment of an "account" within the provisions of Section 3017 of the California Civil Code as it then read and was void as against existing creditors, without actual notice thereof, of Bankrupt because no notice of intention to assign nor notice of assignment was filed as required by Section 3019, California Civil Code.

2. At the time of said assignment there were creditors of the bankrupt who had no actual notice of the assignment.

3. That notwithstanding the method of payment as set forth in Findings of Fact Nos. 11 and 12, the payments made by the State of California were received by the Bank under the assignment.

4. The assigned accounts were extinguished by payment by the State of California to the defendant prior to the filing of Bankrupt's petition in bankruptcy and were then no longer outstanding, by reason of which.

5. At the time of bankruptcy, the creditors of Bankrupt had no right to recover the proceeds of the assigned account from Bank, and plaintiff had no cause of action under Section 70(e) of the Bankruptcy Act against defendant Bank.

6. Judgment shall be entered herein in favor of defendant.

Dated: This 6th day of August, 1956.

/s/ LOUIS E. GOODMAN,  
United States District Judge.

[Endorsed]: Filed August 6, 1956.

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In the Southern Division of the United States District Court for the Northern District of California

No. 31390

JOHN COSTELLO, as Trustee of the Estate of  
William Jason Evans, Bankrupt,  
Plaintiff,

vs.

BANK OF AMERICA NATIONAL TRUST AND  
SAVINGS ASSOCIATION, a National Banking Association,

Defendant.

### JUDGMENT

The above-entitled cause having been tried and submitted to the Court for decision and the Court having signed and filed herein Findings of Fact and Conclusions of Law,

It Is Hereby Adjudged that plaintiff have and recover nothing of defendant herein.

Let Judgment Be Entered Accordingly.

Dated: This 6th day of August, 1956.

/s/ LOUIS E. GOODMAN,  
United States District Judge.

[Endorsed]: Filed and entered August 6, 1956.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL AND NOTICE  
OF HEARING SAME

To the Defendant Above Named and to Messrs.  
Samuel B. Stewart, George Chadwick, Jr., and  
H. H. Bechtel, Its Attorneys:

Comes now the Plaintiff above-named by and through his counsel of record and hereby moves the above-entitled Court for an Order granting a new trial of the above-entitled action on all of the issues joined herein and upon each and all of the following grounds:

1. Irregularity in the proceedings of the Court by which Plaintiff was prevented from having a fair trial.
2. Insufficiency of evidence to justify the decision and judgment of the above-entitled Court.
3. That the decision and judgment of the above-entitled Court is against law.
4. Errors in law occurring at the trial and excepted to by Plaintiff.

This motion is based upon all records, papers and files herein and upon the proceedings had before and minutes of the above-entitled Court and upon Rule 59 of the Federal Rules of Civil Procedure.

Dated at San Francisco this 8th day of August, 1956.

SHAPRO & ROTHSCHILD,  
By /s/ ARTHUR SHAPRO,  
Attorneys for Plaintiff.

Further Take Notice that the foregoing Motion will be heard and determined by the above-entitled Court at the Courtroom of the Honorable Louis E. Goodman, Judge thereof, Room 258, U. S. Post Office and Courthouse Building, at 7th and Mission Streets, San Francisco, in said District, at the hour of 10:00 o'clock a.m., on the 14th day of August, 1956, or as soon thereafter as counsel can be heard.

Dated: August 8, 1956.

SHAPRO & ROTHCHILD,

By /s/ ARTHUR SHAPRO,

Attorneys for Plaintiff.

Affidavit of mail attached.

[Endorsed]: Filed August 9, 1956.

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[Title of District Court and Cause.]

ORDER DENYING MOTION  
FOR NEW TRIAL

Ordered, that plaintiff's motion for a new trial be and the same is hereby denied.

Dated: August 15, 1956.

/s/ LOUIS E. GOODMAN,

United States District Judge.

[Endorsed]: Filed August 17, 1956.

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[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that John Costello, as Trustee of the Estate of William Jason Evans, bank-

rupt, plaintiff hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on August 6, 1956.

Dated: This 16th day of August, 1956.

SHAPRO & ROTHSCHILD,

By /s/ DANIEL ARONSON, JR.,  
Attorneys for Plaintiff.

[Endorsed]: Filed August 17, 1956.

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The United States District Court, Northern District  
of California, Southern Division

No. 31390

JOHN COSTELLO, as Trustee of the Estate of  
William Jason Evans, Bankrupt,  
Plaintiff,

vs.

BANK OF AMERICA, NATIONAL TRUST &  
SAVINGS ASSOCIATION, a National Bank-  
ing Association,  
Defendant.

Before: Hon. Oliver J. Carter, Judge.

REPORTER'S TRANSCRIPT OF  
PRETRIAL CONFERENCE

Appearances:

For the Plaintiff:

SHAPRO & ROTHSCHILD, by  
ARTHUR P. SHAPRO, ESQ.

For the Defendant:

SAMUEL B. STEWART, JR.,  
CHRISTOPHER M. JENKS and  
H. H. BECHTEL, by  
CHRISTOPHER M. JENKS, ESQ.

Thursday, October 14, 1954—10 A.M.

The Clerk: Costello vs. Bank of America.

Mr. Shapro: May it please the Court, we pretried most of this during your Honor's occupation with other matters, so I don't think we are going to take anywhere near as much time as estimated.

The Court: All right, Mr. Shapro.

Mr. Shapro: This action is based upon an amended complaint filed by the Trustee in Bankruptcy of the Estate of Evans, doing business as Evans Construction Company, for the recovery from the defendant of monies allegedly paid to and received by the defendant bank as a result of or as the proceeds of an assignment made to the bank by the bankrupt of monies payable to the bankrupt under two construction contracts.

The complaint is in two counts for that reason. One was a State of California contract. That is the subject matter of the first cause of action. And the second count is in connection with a construction contract undertaken by the bankrupt for the County of Shasta.

In other words, one is a county job, the other is a state job.

The jurisdictional elements and so forth in con-



nection with the matter have been in effect admitted by the pleadings. [2\*]

It is proposed here, your Honor, as part of this pretrial conference to agree upon, and I think we have in effect agreed upon the method by which this matter may be presented to the court upon trial with a minimum of extraneous or oral testimony. We feel that the greater part of the issues involved can be demonstrated to the Court on trial by written documents. And we have many legal problems, but those I think had best be addressed to the trial judge after the record is completed. We had hoped in the first instance that the matter might be submitted even on a pretrial basis with a stipulated statement of facts. However, in justice to both parties I am afraid that is impossible. There are some questions of fact developed that are material to the defense, material to the case, and we can't do that.

We have discovered, your Honor, as a preliminary that we have made certain clerical errors in connection with the complaint which we desire to ask leave to amend upon the face because they are clerical, and Mr. Jenks on behalf of the defendant has indicated in our previous discussion that the defendant will ask for permission to file an amended answer. He does not have it ready.

However, the record may show that the plaintiff has no objection to the filing by the defendant of an amended answer—that is, without limitation as to the subject matter.

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\*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Now, if your Honor will examine page 4 of the amended [3] complaint, the third line, Paragraph III, the sum, the figure there, \$3,300.00, that figure should have been \$13,000.00.

The Court: You will see that is put in by interlineation?

Mr. Shapro: Yes, your Honor, if I might.

The Court: Mr. Clerk, Paragraph III, line 4, page 4, \$13,000 in lieu of \$3,300.

Mr. Shapro: The only other change required is in the prayer, first line, page 5, the figure \$20,000.00 should be \$20,300.00.

The Court: All right.

Mr. Shapro: The next line, the \$13,300.00 figure should be \$13,000.00.

The Court: Page 5, line 1——

Mr. Shapro: Yes.

The Court: ——the figure \$20,000 should be stricken and in lieu thereof should be inserted the figure \$20,300?

Mr. Shapro: Yes, your Honor.

The Court: Then line 2, page 5 of the complaint, in place of the figure \$13,300——

Mr. Shapro: Should be \$13,000 even.

The Court: \$13,000 even.

Mr. Shapro: The aggregate is the same, so that need not be changed.

The Court: Those amendments will be permitted.

Mr. Shapro: Now, the subject matter of Paragraph V of the [4] first count involves entry by the bankrupt into a contract with the State of California, which we will call for the lack of a better term,

a construction contract. Neither party, your Honor, as of this moment, has available a copy of the contract. Mr. Jenks and I have conferred as to—we are trying to avoid getting it from the State because it is a very, very, bulky document and most of it will be immaterial. We feel that a copy may be available in the local office of the bonding company that wrote the bond, and, if so, we will attempt to get it and have it at the time of trial; and, if not, we will jointly attempt to examine the files in Sacramento and pick out the pertinent parts of the contract, and obtain photostatic copies from the State, if we can. I am sure we will agree it isn't material to this issue that the contract in question that refers to the County of Shasta be available for the trial court.

The Court: How are you going to handle that in a pretrial order?

Mr. Shapro: I will say as far as a pretrial order is concerned that the contract would be supplied to the court by stipulation of counsel.

The Court: Is that satisfactory?

Mr. Jenks: Satisfactory.

Mr. Shapro: Yes, satisfactory, your Honor.

Now, the evidence in connection with the allegations of [5] Paragraphs VI and VII has in effect admitted the assignment. We would like to have the original of that assignment.

The Court: VI and VII of what count?

Mr. Shapro: First count, page 2.

The Court: All right.

Mr. Shapro: They are treated in the answer almost jointly. That is why I refer to them that way.

In other words, they don't admit it was a loan of \$20,000. They set forth that it was loaned in a series of amounts, but the aggregate is the same, and they admit the assignment of the contract.

If counsel for the Bank has either the original or a photostatic copy of the assignment, then, so far as we are concerned, that may be admitted in evidence in connection with the pretrial order.

Do you have that, Mr. Jenks?

Mr. Jenks: I believe we have photostatic copies. The originals are on file.

The Court: Is the authenticity of it going to be questioned?

Mr. Shapro: Not by us, no.

The Court: By either party?

Mr. Jenks: As I told Mr. Shapro, we will be glad to furnish him prior to the trial with photo copies of our photographs.

The Court: The point is, objections to competency, [6] relevancy and materiality are reserved. What I am trying to determine is whether there is going to be any question as to foundation, any question as to authenticity that will be raised by the parties? In other words, you want to narrow the issues, you don't have to lay any foundation. The only question then that remains: Is it competent, relevant or material.

Mr. Shapro: Yes.

Mr. Jenks: Yes.

The Court: That is reserved, but as to any objections to the document that it is not the best evi-

dence or anything of that sort, those are all to be determined in pretrial.

Mr. Jenks: That's correct.

Mr. Shapro: That's correct.

The Court: You are willing then that the order show that it may be subject to that objection?

Mr. Shapro: That it may be admitted subject only to those objections.

The Court: Is that correct?

Mr. Shapro: Yes.

The Court: The photostatic copy may be used in place of the original?

Mr. Shapro: That is also agreeable.

Now, with respect to the allegations of the answer to the amended complaint—I am referring to Paragraph III of the [7] answer, beginning at line 5 of page 2, wherein the dates and amounts of loans and payments are set forth; so far as the plaintiff is concerned we will be glad to waive any objections, including objections as to materiality, competency, relevancy of the banks' records by photostatic copy. Concerning the contents of the paragraph and with respect to the payments, I understand from Mr. Jenks that the bank expects to have available photostatic copies of the State warrants involved.

Mr. Jenks: We have copies of the State warrants, Mr. Shapro, but object only to your use of the photostatic copies. We will be glad to supply copies of our commercial ledger sheets and let you compare them with the original. However, those are bound monthly into bound volumes, and in order to make photostats I would have to tear the sheets out of the



bound volumes. We will make manual copies and then you may compare them with the originals.

Mr. Shapro: That is perfectly satisfactory.

The Court: The objection then to—all objections to the copies are waived?

Mr. Shapro: Yes.

Mr. Jenks: Yes.

The Court: Then the copies will be admissible in evidence.

Mr. Shapro: May we shorten time on this, Mr. Jenks, will the same documents and in the same form be available to us in [8] connection with the second count?

Mr. Jenks: That's correct.

Mr. Shapro: Then the same stipulation may cover the second count.

Well, I would say, your Honor, subject to correction by Mr. Jenks—I was going to say that we have covered about all we could on pretrial. I have one reservation.

In the answer, if your Honor please, the bank sets up that a prior assignment—the bank alleges prior assignment of the monies due the bankrupt under this contract with Glens Falls Indemnity Company, and also sets up that the bank received the consent of the Glens Falls Indemnity Company to the assignment to the bank.

I have told Mr. Jenks, and I think he agrees with me, that the assignment or purported assignment from the bankrupt to Glens Falls Indemnity Company is not available; I mean, we just haven't been able to find it. I have from the Glens Falls In-



demnity Company attorney, Thomas E. Davis, in response to my request for copy of the document itself, the assurances that it was on the regular form, printed form, of the Glens Falls Indemnity Company. I am perfectly willing, on behalf of the plaintiff, to use and stipulate that the assignment in question was in the form that the company has furnished to us, even though we don't even have a copy of the instrument.

I don't know how Mr. Jenks feels about it. [9]

Mr. Jenks: I will so stipulate, unless between now and the trial Mr. Davis finds us the original, and we will use it.

The Court: Subject to that exception, the stipulation may be made.

Mr. Shapro: And the document, which for brevity's sake may be called the consent of the Glens Falls to the assignment to the bank, has been furnished to us by photostatic copy by the defendant bank, and it is dated September 15, 1948, and we waive objections to its authenticity, and we also consent to its admission in evidence. We waive all objections to it.

The Court: That will be so ordered.

Mr. Shapro: So far as I know, your Honor, that represents about all that can usefully be done on a pretrial in this case.

Mr. Jenks: You have a rather interesting case here, your Honor—I am not going to argue the law, but I will mention the problem: First, whether a construction contract is an account receivable. That is the initial question.

And, second, assuming it is, how far back they can go to collect money which the bank received under it, because I know—we agree, all of us, that the bank's last receipt was 9 months before bankruptcy.

The Court: Isn't there just a case now down out of the Court of Appeals in the Southern District of California that involved this very question? [10]

Mr. Jenks: I haven't seen one out of the Court of Appeals from there yet. I think there are conflicting cases in the District Court.

The Court: Just in the advance sheets—I mean, in the slip sheets.

Mr. Shapro: We looked for it, but I haven't seen it.

The Court: It may not be on the precise question, but, as I recall it, the argument was between a trustee and the subcontractors of the main contractor as to whether or not the trustee was entitled to the money or——

Mr. Shapro: It may be; I am not familiar with the case.

The Court: They held that the subcontractor was entitled to the money, under that particular situation.

Mr. Jenks: We will look for it. Thank you.

The Court: I just read it last week.

Mr. Jenks: There are conflicting decisions from the Southern District, one by Judge Hall, one by Judge Mathes. I will use one, he will use the other.

Mr. Shapro: We don't consider them conflicting. one, when the time comes for the argument.

The only one, of course, that we think affects this case, is the one that is in our favor.

The Court: You can use the Courts of Appeal decision for what it is worth. I don't know whether it covers this point or not. [11]

Mr. Jenks: The reason I suggested we would like to amend and do it formally, Paragraph VII of both counts of the answer, Paragraph VII of the first count of the answer on page 4, and Paragraph VII of the second count of the answer which appears on page 7, as originally drawn the complaint demanded from the bank the full amount which had flowed through the bank. As amended, they are now only demanding the amount which was used by the bank to pay off its loans. I think possibly the larger allegation is unnecessary but therein it could be argued where they allege the state in one case and the county in the other paid the bank and where we admit that we received money from the State that it was an admission that the bank had received it as the bank. So we would like leave to amend.

We may get a little evidentiary, as Mr. Shapro knows, in the Shasta deal. The warrants were bailed to the bank as assignee, but all the money was deposited in the general account. In the State, the warrants were bailed to the bank as assignee, but, with one exception, they were deposited in a special account which the bonding company required.

So I would like to file an amendment to those two Paragraphs VII which may set forth a little evidence, but I think is necessary to clear up the situation.

The Court: Mr. Shapro?

Mr. Shapro: We have no objection. [12]

The Court: And how much time do you want?

Mr. Shapro: You name it.

Mr. Jenks: Let's say 10 days. That would be a week from next Monday.

Mr. Shapro: That's satisfactory.

The Court: Who will prepare the pretrial order?

Mr. Shapro: I guess I better do it.

The Court: If you will submit it to Mr. Jenks for his approval, and, after approval, I will make the order.

#### Certificate of Reporter

I (We) Official Reporter(s) and Official Reporter(s) pro tem, certify that the foregoing transcript of 13 pages is a true and correct transcript of the matter therein contained as reported by me (us) and thereafter reduced to typewriting, to the best of my (our) ability.

/s/ .....

[Endorsed]: Filed April 27, 1955. [13]

In the District Court of the United States, for the  
Northern District of California, Southern Division

No. 31390

JOHN COSTELLO, as Trustee of the Estate of  
William Jason Evans, Bankrupt,

Plaintiff,

vs.

BANK OF AMERICA NATIONAL TRUST AND  
SAVINGS ASSOCIATION, a National Bank-  
ing Association,

Defendant.

Before: Hon. Louis E. Goodman, Judge.

### REPORTER'S TRANSCRIPT

Appearances:

For the Plaintiff:

SHAPRO & ROTHSCHILD, by  
ARTHUR P. SHAPRO, ESQUIRE, and  
DANIEL ARONSON, JR., ESQUIRE.

For the Defendant:

GEORGE CHADWICK, JR., ESQUIRE,  
ELDON C. PARR, ESQUIRE.

October 18, 1955—10:00 o'Clock A.M.

The Clerk: John Costello, as Trustee of the  
Estate of William Jason Evans, Bankrupt, versus



Bank of America, National Trust and Savings Association, on trial.

Mr. Shapro: Ready for the plaintiff, your Honor.

Mr. Chadwick: Ready for the defendant.

The Clerk: Will respective counsel please state their appearances for the record?

Mr. Shapro: Arthur P. Shapro, of Shapro & Rothschild, and Daniel Aronson, for the plaintiff, your Honor.

Mr. Chadwick: George Chadwick and Eldon C. Parr for the defendant, Bank of America, your Honor.

The Court: Proceed.

Mr. Shapro: Your Honor, this is an action that is now based upon an amended complaint to set aside the transfer of accounts receivable by the bankrupt to the defendant Bank of America.

The action is predicated upon the provisions of the Civil Code, principally Sections 3,017, 3,018 and 3,019, as though sections read and were in force at the time of this transaction.

Those sections, in brief, your Honor, provide a means by which assignments of accounts receivable may become the subject of public notice, and therefore to eliminate the so-called secret lien or assignments of accounts receivable [3\*] without the knowledge of creditors.

The complaint is in two counts and refers to two successive assignments by the bankrupt to the Bank of America of monies due or to become due to him,

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\*Page numbering appearing at top of page of original Reporter's Transcript of Record.



he being a general construction contractor; one, in the first count, from the State of California on what will be commonly termed here during the course of the trial, your Honor, the Chamberlain Creek job, and the second, in the second count, the assignment of proceeds of money due or to become due to him as contractor on a job done in the County of Shasta, which is referred to as the Pittville or Pitt River job.

The assignment to the Bank of America in count number one is dated and made, and the pleadings admit, that it was made September 15, 1948. The bankruptcy in this case did not take place until February 27, 1950.

This is not a preference action in any sense of the word. This is strictly an action under Section 70(e) of the Bankruptcy Act by which the trustee is vested with the right to set aside any transfer which, under any law, State or Federal, would be voidable by a creditor of the bankrupt. That is the basic jurisdiction of these causes of action.

The first count, which involves \$20,300.00——

The Court: Prior to 1948, under the California Code, did they have a right to set aside this transfer?

Mr. Shapro: Yes. [4]

The Court: On what grounds?

Mr. Shapro: On the ground that the defendant failed to comply with the provisions of Section 3017, called a notice of intention to assign accounts receivable. That, incidentally, the failure to record, is admitted in the pleadings. There is no issue on that.

To sum up, your Honor, there are innumerable defenses—I mean legal defenses. I don't know whether there are any tangible defenses or not. We have had a pretrial. We have more or less agreed on a substantial part of the factual evidence in the case.

The Court: What did the creditor have to show under the California section to set aside a transfer of accounts receivable on the ground that the statutory proceedings had not been followed?

Mr. Shapro: He would have to show, first, that he was a creditor at the time, or that he became one prior to that time; that at the time he became a creditor he had no knowledge of the accounts receivable assignment.

Now, there are other aspects to it with respect to if he became a creditor after the assignment, but without notice of the—I mean, prior to the time of the notice, prior to the recordation of the notice. Similar to the unrecorded mortgage situation.

That doesn't apply in this case because, your Honor, we [5] intend to prove——

The Court: But, Mr. Shapro, what did he have to show besides the fact that he was a creditor at the time and that the statutory procedures were not complied with?

Mr. Shapro: He would also have to show that the defendant was paid the money or so had the uncollected accounts receivable under the assignment. That is all. The question of solvency or insolvency is not involved in this action at all.

The Court: What does the creditor accomplish under that section?

Mr. Shapro: He sets aside the transfer. In other words, it is voidable as to him.

We are relying, to a great extent, your Honor, upon the only known reported case on the subject, at least the only one that we know of, in which these various questions that your Honor is asking me were answered by Judge Burn in the Southern District of California in the case of Menick versus Carson.

The Court: I didn't mean to have you get into a law argument. I was trying to find out what the picture is.

Mr. Shapro: Yes. Well, it is very similar—As your Honor knows, an unrecorded mortgage, during the period it is off the record, is void as to any creditor, or at the instance of any creditor who was a creditor at the time the mortgage was given or who became such prior to the recordation of the mortgage. [6]

Nothing else is required. In other words, you don't have to prove insolvency; you don't have to prove reasonable cause to believe. You don't have to prove anything else but the fact that the statutory requirement for, in this case, assignments of accounts receivable or, in the case of the mortgage, the actual mortgage itself.

The Court: So that if the assignment were set aside on the ground that the statutory procedures were not complied with——

Mr. Shapro: It would redound to the benefit of the estate.

The Court: ——it would not belong to the assignee and would become by succession the property

of the trustee in bankruptcy?

Mr. Shapro: Right. There is an issue, and I think this is as good a place as any to point it out to your Honor, there is an issue and a serious issue between the plaintiff and the defendant as to whether or not these contracts or the proceeds of the contracts which were collected by the bank—we say pursuant to the assignment, they say regardless of the assignment—whether or not it was a type of an account as defined by the statute, which is Section 3018 of the Civil Code, which is the subject of the regulatory statute.

In other words, they contend, as I understand it, that this is not the type of account—and I use the word “account” because it is defined in the statute and that is the basis of this action—they say it is not the type of account which [7] could be the subject of the statute, and therefore they didn’t have to comply with the statute. That is one of the principal issues in the case.

Your Honor will note from the Answer—and I am not undertaking to make a statement for the defense, but your Honor will note from the Answer, and I am referring now to Paragraph III of the Answer to the Amended Complaint, the Bank denies that the money was loaned prior to the 15th of September; but further on in the paragraph they admit and indicate clearly the dates of the loans which they made pursuant to what they allege to be an agreement to finance the bankrupt in connection with the Chamberlain Creek job.

That is the \$20,300.00 over a period of 13 different



loans, evidenced by 13 different notes, numbered as the paragraph in the Answer indicates.

They also admit in that same paragraph the payments and how they were applied with respect to the various notes. We will undertake to prove, as I believe the statute on which we rely requires, that these payments were made to them pursuant to and they acquired this money by virtue of payments pursuant to assignments.

Obviously, your Honor, if they didn't get the money, payments of these notes, as a result of or pursuant to the assignment, we would have no cause of action against the bank, because they received this money more than five months prior [8] to the commencement of the bankruptcy proceedings.

At this time, your Honor, I think it wise because we are going to get very shortly into the only controversial phase of the case that I know of on the facts, to make a motion at this time, your Honor, to dismiss the second count of the complaint entirely.

I might state that the reason for so doing is because we have become convinced by reason of the documentary evidence furnished us by the Bank, the defendant, and also documentary evidence found upon the records of the bankrupt in this case, two things: First, that the \$3,500.00, or the amount involved in the second cause of action, was actually both loaned and paid back to the bank prior to making of the assignment, so obviously that could not possibly be the subject of recovery.

And we have also ascertained with respect to the second count that the two other payments, the

\$7,000.00 and the \$2,500.00 payment, which is admitted in Paragraph IV of the Answer with respect to the second count, we have come to the conclusion that those payments were made out of the general account of the bankrupt in the Bank, the Bank of America, into which the gross proceeds of the checks from the County of Shasta were deposited by the Bank.

In other words, we do not feel we can prove an identity of funds sufficient to charge the Bank as having received the two payments in December and January, under or by virtue of the [9] assignment in question.

So we ask leave of Court to dismiss the second count.

The Court: I suppose counsel has no objection to that?

Mr. Chadwick: No, your Honor.

The Court: All right. The second count may be dismissed.

Mr. Shapro: Now, we will also undertake to prove to your Honor that there were creditors of the bankrupt in existence whose debt arose prior to September 15th, 1948, the date of the assignment of the Chamberlain Creek job, which creditors are still creditors and whose claims have not since been paid.

We will also undertake to show, your Honor, not only that the monies due or to become due under this construction contract were to be and could be, as the statute says—it becomes an accounts receivable in the ordinary course of business. We will prove that it did in fact become an account receivable as the



statute and the cases in California have determined an account receivable to be.

In substance, your Honor, I believe that represents the plaintiff's view of this case.

The Court: Do you wish to make a statement now?

Mr. Chadwick: Only briefly, your Honor, I would like to indicate my view.

I agree with Mr. Shapro as to the issues which we face here. In the first place, as he suggests, there is an issue [10] of fact as to whether, with respect to the first count of the complaint, the trustee represents creditors who, at the time of this transaction, were in a position to attack these assignments. That is a factual question.

Now, our primary position, your Honor, is that the monies to become due from the estate under the contract, which is involved now, did not represent or result in an account which was within the California statute requiring notice of assignments of such account to be made.

In the second place, our next contention is, your Honor, that notwithstanding that situation, in this instance the accounts which were assigned were actually paid by the bankrupt's obligor, which puts us in an entirely different situation than many of the cases.

In this cause, the trustee is seeking to recover back from the Bank monies which the Bank actually received in payment and discharge of bankrupt's obligation, and, as Mr. Shapro says, there is no question of preference involved here at all. We

think that puts a different complexion on the matter.

The Court: The plaintiff has to show that the money by which the obligation was paid was the proceeds of the account receivable?

Mr. Shapro: That is right.

Mr. Chadwick: Well, I don't think there is any factual question, your Honor, but the question is a legal one. That is, [11] the assignment which may have been vulnerable to attack by these creditors was the assignment of monies to become due from the State in the performance of this contract.

Now, while these creditors would have the right to attack that transaction so long as those accounts which had been assigned remain unpaid, it is our further position that the accounts have been in fact been paid; there was nothing for these creditors to set aside, as it were.

The account, if you concede it to be an account for the purpose of this argument, no longer existed but had been paid.

The Court: You mean at the time these people became creditors?

Mr. Chadwick: No, subsequently, your Honor. There is conflict in the authorities on this proposition, your Honor, but I merely wanted——

The Court: That is not quite clear to me what you mean by that.

Mr. Chadwick: Your Honor, there are cases holding in a situation of this kind with respect to assignments of accounts receivable, that when the trustee in bankruptcy comes in, standing in the

shoes, as it were, of some of these creditors who existed at the time of the transaction, he is entitled to set aside the transaction insofar as the accounts remain outstanding and unpaid, and therefore to acquire whatever interest the bankrupt had in those still unpaid accounts. [12]

Those cases make a clear distinction that insofar as those accounts which in fact have been paid are concerned, the trustee has no right of recovery. We will cite cases to your Honor of that proposition.

Now I think, your Honor, that represents the controversy that exists between us here.

The Court: You mean by that that some of the courts have held that the only thing that is reachable in this type of proceeding is the unpaid assignment payment?

Mr. Chadwick: Yes, your Honor, exactly.

The Court: Well, do you have some evidence? What did you agree to on the pretrial?

Mr. Shapro: Well, we didn't agree to any facts, your Honor. The pretrial order merely simplified the order of proof. We didn't actually agree on any particular facts.

The Court: Well, you put on what you have to put on, then.

Mr. Shapro: Thank you, your Honor.

Mr. Evans, please.

## WILLIAM JASON EVANS

called as a witness on behalf of the plaintiff; sworn:

The Clerk: Will you please state your name to the Court?

A. William Jason Evans.

## Direct Examination

By Mr. Shapro:

Q. Where do you live, Mr. Evans?

A. Walnut Creek. [13]

Q. What is your business or occupation, sir?

A. I am employed by the Henry Kaiser Company.

Q. In what capacity? A. Engineer.

Q. And in the years 1947, 1948 and 1949, what was your occupation?

A. I was a general contractor.

Q. And you are the bankrupt in the proceedings pending in this court based upon a petition filed by you on February 27, 1950, is that correct?

A. Yes, that is correct.

Q. And at and before that time, did you do business under a trade name?

A. Evans Construction Company.

Q. In the course of your business as Evans Construction Company, or as a general contractor, in the year 1948, did you have occasion to do business with the State of California? A. Yes.

Q. And what type of business was it?

A. It was a bridge construction job.

Q. And was it a job awarded as the result of competitive bidding? A. Yes, it was.

(Testimony of William Jason Evans.)

Q. Was there a written contract entered into between you and the State on this job? [14]

A. Oh, yes.

Q. And may I say that the job we are talking about is called the Chamberlain Creek job.

A. Yes.

Mr. Shapro: (Handing document to counsel.)

Q. I show you, Mr. Evans——

The Court: Well, there is no objection, is there?

Mr. Chadwick: No, we have no objection.

The Court: Just have it marked.

Mr. Shapro: We will offer in evidence at this time the contract for the Chamberlain Creek job, being State contract No. 14-D-C-36.

(Thereupon, the contract was marked Plaintiff's Exhibit No. 1 and received in evidence.)

Q. (By Mr. Shapro): Mr. Evans, I am going to show you two books. Can you tell me what these books are? Not the contents but just the nature of the books.

A. These are the ledger and accounts receivable and accounts payable. All the books pertaining to our construction work.

Q. When you say they are books pertaining to your construction work, you mean the Evans Construction Company for the period of 1948 and 1949?

A. Yes.

Mr. Shapro: May these books be just marked for identification, your Honor, please? [15]

The Court: Yes.



(Testimony of William Jason Evans.)

(The books of account referred to were marked Plaintiff's Exhibits Nos. 2 and 3 for identification.)

Mr. Chadwick: Which is which?

Mr. Shapro: The general ledger will be No. 2 and the journals will be No. 3.

Q. Now, Mr. Evans, in addition to the work done for the State of California in connection with this contract, which is now Plaintiff's Exhibit 1, did you do other construction work during the year 1948?

A. Yes, there was the Pitt River job we had going at that time.

Q. I am not referring only to the time that the Chamberlain Creek job was running, but during the whole year 1948 did you do other jobs?

A. I don't recall. I don't think so. I am not quite positive.

Q. Did you do in 1947 other jobs? A. Yes.

Q. Did you do in 1949 other jobs? A. Yes.

Q. Were the transactions evidenced by the jobs that you did, so far as the financial phase of it is concerned, to your knowledge entered in these books that have been identified?

A. That is correct, they were. [16]

Q. And were the jobs done for the State of California, the Chamberlain Creek job, so far as you know, entered in the books in any different way than the other jobs?

A. No, they were entered the same way, only they had a job number assigned to them.



(Testimony of William Jason Evans.)

Q. Now, referring your attention, Mr. Evans, to the year 1948, and to the date September 15th, which is the date that the contract was let on this Chamberlain Creek job, and also the date it has been admitted you assigned the proceed of that contract to the Bank of America, referring your attention to that date, can you tell the Court whether or not at that time you owed money to any persons which monies were still owing at the time of your bankruptcy in 1950?

A. I think there was two or three creditors that I owed money to.

Q. Would the schedules filed by you in this court, Schedule A of your creditors, refresh your memory as to the identity of any such creditors?

A. I think it would.

Q. I show you, Mr. Evans, the schedules filed by you, one of these triplicate originals filed by you in this court on February 27, 1950, and particularly to Schedule A-3 thereof, which is the list of unsecured creditors.

Will you examine that list, please, and tell the Court which of those creditors listed had claims which arose prior [17] to September 15, 1948?

The Court: And which were in existence at that time?

Q. (By Mr. Shapro): And which continued to be owed by you until the date of your bankruptcy.

A. I think A. J. McCosker is one of them.

Q. What is the name? A. A. J. McCosker.

Q. And how much did you owe him at the time

(Testimony of William Jason Evans.)

of your bankruptcy which you also owed him prior to September 15th, 1948?

A. A hundred dollars is listed here.

And the J. H. Hein Company of Redding.

Q. How much? A. I think that was——

Q. (Interposing): How much did you owe the J. H. Hein Company at the time of your bankruptcy which was owing since the time prior to September 15, 1948? A. We have listed here \$168.48.

Then there is Frank Ragland.

Q. How much was that?

A. He had a note for \$3,000.00.

Q. Which arose prior to September 15, 1948?

A. Yes, that was before that date.

Q. Any others, sir?

A. None that I can recall offhand here.

Q. Do you want to look at it carefully? [18]

A. That is all I am sure of. There may be some others that I am not sure of until I dig into the records.

Q. All right. Now, Mr. Evans, after the assignment of the monies due or to become due under this Chamberlain Creek contract to the Bank of America, you received advances from the Bank, did you not?

A. That is correct.

The Court: He hasn't testified yet that he assigned it. Is that stipulated?

Mr. Shapro: Well, that is stipulated to. In fact, one of the documents involved in the pretrial I will offer in a moment, which is the assignment itself, your Honor.

(Testimony of William Jason Evans.)

The Court: All right.

Mr. Shapro: That is one of the few things we did accomplish in the pretrial.

Q. After the monies were advanced, you started the job, did you? A. That is correct.

Q. And progress payments were made by the State from time to time, is that right?

A. Monthly, yes.

Q. Now, will you tell the Court, please, how those payments were handled? By that I mean as to whom did the checks or the warrants from the State go.

A. Well, they went directly to the Bank. [19]

Q. They went directly to the Bank? And how were the payments made on the loans that the Bank had made to you in connection with this Chamberlain Creek job?

A. Well, Mr. Dodson would call me up. He is one of the officials of the Bank of America, in Berkeley. He would call me up and tell me he had some money for me, and so I would go up and take my check book with me, and we would sit down to his desk and we would write out—we would pay the Bank of America the amount of money that was due them, and then we would go over and get my receipt for the deposit of the rest of the money.

Q. In other words, Mr. Evans, is this the fact: that you were called by Mr. Dodson over to the Bank, the Bank had a check from the State there, a warrant from the State, is that right?

A. I imagine it was there. I never saw it.

Q. You never saw it? A. No.

(Testimony of William Jason Evans.)

Q. And at his request you drew a check to the bank for a given amount?

A. That is correct. I would go over to the loan window and pay my loan and go to another window and get my receipt for the deposit.

The Court: The warrants then were deposited to your account?

Mr. Shapro: I am going to get to that in a minute.

The Court: All right. [20]

Mr. Shapro: I will get to that in a moment, if you don't mind.

The Court: All right.

Q. (By Mr. Shapro): To what account, if you know, was these warrants credited by the Bank?

A. Well, they were credited to our—well, to our general account, which was the only account we had.

Q. This is the State job, Mr. Evans? This is the State job now?

A. Pertaining to the Chamberlain Creek job.

Q. This was the State job, then?

A. That was credited to our account, the account which the bonding company had, and it required a counter signature on the check for any money to be withdrawn.

Q. As a matter of fact, Mr. Evans, there were two accounts of yours in the Bank at that time?

A. That is correct.

Q. One was the general account and one was called a special account?

A. That is right.

(Testimony of William Jason Evans.)

Q. This special account was an account in which a counter signature besides yours was required?

A. That is right. That as pertaining to this job.

Mr. Shapro: At this time, if your Honor please, I will offer in evidence the assignment from Evans to the Bank, dated [21] September 15th, or photostatic copy of it.

The Court: Very well.

(Thereupon, the assignment was admitted into evidence as Plaintiffs' Exhibit No. 4.)

Q. (By Mr. Shapro): I am going to show you, Mr. Evans, a photostatic copy of a letter dated September 15, 1948, addressed to the Bank of America and signed by the Glens Falls Indemnity Company, and also purporting to be signed by you, and ask you first if that is your signature or a photostat of your signature.

A. That is right.

Q. Will you read this document, and after you have read it, tell the Court whether or not that is the document as a result of which the special account was opened.

Mr. Chadwick: Mr. Shapro, so far as the Bank is concerned, I am willing to admit that that was the document which resulted in the creation of the Evans Construction Company special account.

Mr. Shapro: We will accept the stipulation, sir. We will offer it in evidence, then, the September 15th letter.

(Thereupon, the letter dated September 15, 1948, was admitted into evidence as Plaintiff's Exhibit No. 5.)



(Testimony of William Jason Evans.)

Q. (By Mr. Shapro): You ultimately completed the job, is that right? A. Yes.

Q. And full payment was made by the [22] State? A. That is correct.

Mr. Shapro: I have no further questions of this witness at this time, your Honor.

### Cross-Examination

Mr. Chadwick: Will you bear with me just a moment, your Honor?

(Discussion between counsel off the record.)

Mr. Chadwick: Your Honor, in order to avoid the necessity of examining the witness, I will ask Mr. Shapro now to stipulate that the three items to which Mr. Evans testified as being amounts owed by him prior to September 15, 1948, to several creditors, and which were remaining owing at the time of his bankruptcy, were the items of \$100.00, \$168.48, and \$3,000.00, and that he had at that time no other creditors.

Mr. Shapro: Now, I am willing to stipulate, as counsel says, with one qualification. That is, I think, purely a legal one.

In the course of this trial the indemnity agreement executed in favor of the Glens Falls Indemnity Company will be brought in. We are going to bring it in. We are going to take the position as a matter of law that the indemnity agreement having been executed prior to the assignment, the indemnity agreement from the bankrupt to Glens Falls In-

(Testimony of William Jason Evans.)

demnity Company having been executed and entered into prior to the assignment, even though the bonding company didn't pay any loss on that job [23] until after the assignment, is still, as a matter of law, an obligation of the bankrupt's sufficient to give strength to this particular type of case.

In other words, I am not going to ask you to stipulate to any amount, but I want to qualify that. I don't ask you to stipulate that Glens Falls is a creditor. I wouldn't do that.

Mr. Chadwick: I understand.

Mr. Shapro: I want this stipulation as to these three creditors to be subject to that qualification.

Mr. Chadwick: That is agreeable to me, your Honor.

The Court: Very well.

Mr. Shapro: Thank you.

Mr. Chadwick: I have no questions. Witness excused.

Mr. Shapro: Mr. Mendelson.

### SAMUEL MENDELSON

called as a witness on behalf of the witness; sworn:

The Clerk: Will you please state your name to the Court?

A. Samuel Mendelson.

### Direct Examination

By Mr. Shapro:

Q. Mr. Mendelson, what is your occupation?

A. I am a certified public accountant.

(Testimony of Samuel Mendelson.)

Q. Practicing in San Francisco? A. Yes.

Q. For some years past? A. Yes. [24]

Q. At the request of the trustee in this case, did you make an examination into a portion of the records which are now marked for identification as Plaintiff's Exhibits 2 and 3? A. Yes, I did.

Q. That is the two books.

Mr. Shapro: For the information of Court and counsel, I am going to direct these questions to the content of Paragraph III of defendant's answer.

Q. Mr. Mendelson—— A. Yes, sir?

Q. Do you find in the books of Mr. Evans that you have before you records of the loans from the Bank of America on the Chamberlain Creek job?

A. Yes, sir.

Q. And do those books—withdraw that.

In what account do you find that entry?

A. Sir? In what account?

Q. What account? Well, withdraw that.

In what book or record do you find that?

A. I have before me the record of cash received from the Evans Construction Company, and there are a series of notes listed in that record from the Bank of America, and various dates upon them.

Q. Now, using September 16th, 1948, as the beginning date, and December 20th, 1948, as the ending date—— [25] A. Yes, sir.

Q. Do you recall having at my request checked the items that are in the defendant's Answer against the books? A. Yes, I did.

(Testimony of Samuel Mendelson.)

Q. And did you find that the \$20,300.00 referred to in the Answer was entered in the defendant's books on or about the dates and in the amounts set forth in the Answer? A. Yes, sir.

Q. To what account in the general ledger, if any, were those advances transferred from the cash receipts?

A. They were posted to the account described as notes payable.

Q. Notes payable? Now, did you also find among the records of the bankrupt that you have before you, the evidence of the payments referred to in Paragraph III of the Answer, namely, payments beginning October 11, 1948, and ending April 7, 1949? A. Yes, sir.

Q. And in what account did you find the primary evidence of those payments?

A. This was recorded in the cash received record of the Evans Construction Company, and the items are debited or charged to the Bank with the indication "Special," and they are credited to the account described as accounts receivable. From this record they were then transferred to "Cash in Bank," in an asset account, and the credit was credited to the account described as accounts receivable, also an asset. [26]

Q. Now, the accounts receivable item that you have referred to, did that refer to the Chamberlain Creek job? A. Yes.

Q. State of California? A. Yes.

Q. And are the items of payments beginning Oc-

(Testimony of Samuel Mendelson.)

tober 11, 1948, and ending April 7, 1949, as indicated by the Bank as having been received by them, all entered in the accounts receivable account of the bankrupt on the Chamberlain Creek job?

A. Yes, sir.

Q. Will you point out, please, Mr. Mendelson, the accounts receivable on the Chamberlain Creek job, what you have termed an account receivable on the Chamberlain Creek job in these books?

A. This is the account described as "State of California, Division of Highways," and the items that were in question from the Answer as it was given to me, are starting with the sales register, indicating September 20, \$5,445.00, was charged to the account. This came about from an entry from the sales register where the items were debited to accounts receivable and credited to sales, and then subsequently a payment is recorded therein.

Q. Well, am I correct, Mr. Mendelson, for the purpose of brevity, in stating that the so-called account receivable from the Chamberlain Creek job was account No. 32 in the accounts [27] receivable ledger of Evans Construction Company?

A. Yes, sir, it is.

Q. And consisting of how many pages?

A. The account indicated 32 is the general ledger description for accounts receivable, and this is the subsidiary record therein, "State of California, Division of Highways."

Mr. Shapro: I wasn't trying to minimize the record, your Honor and Mr. Chadwick.



(Testimony of Samuel Mendelson.)

Q. In other words, the account to which we are addressing our attention consists of two pages on which entries appear on a total of three sides?

A. Yes, sir.

Q. Will you take that out?                   A. All right.

Mr. Shapro: Mr. Chadwick, I have apparently mislead the witness and the Court. The account on the third page under "State of California" is the Division of Architecture. It is a different job. The Division of Highways is a different job consisting of only one sheet written on two sides.

Mr. Chadwick: Very well.

Mr. Shapro: We will offer that ledger sheet, accounts receivable sheet, in evidence.

Mr. Chadwick: No objection.

(Thereupon, the foregoing ledger sheet was marked Plaintiff's Exhibit No. 6 in [28] evidence.)

Q. (By Mr. Shapro): As I understand it, then, Mr. Mendelson—you correct me if I am wrong——

A. Yes, sir.

Q. As the State made payments, they were credited to the account receivable which is now in evidence, and they were charged from the sales records previously, substantially the amount that was subsequently paid by the State?

A. Yes, sir. There was a little short—The final amount that was set up by Mr. Evans as due from the State was slightly over what the State paid.

(Testimony of Samuel Mendelson.)

There was a difference of a couple of hundred dollars.

Q. Then that portion, if any, of the monies that the Bank of America received on account of its loans, as indicated in the Answer and the ledger sheet and the cash record you referred to, was also entered in the books as a debit to the note payable to the Bank, is that right? A. Yes, sir.

Mr. Shapro: I think that is all I have of this witness.

#### Cross-Examination

By Mr. Chadwick:

Q. Mr. Mendelson, again referring to this Plaintiff's Exhibit 6—— A. Yes, sir?

Q. ——would you indicate to me—you referred to an item of September 20th?

A. Yes, sir. [29]

Q. Of \$5,445.00? A. Yes, sir.

Q. Representing a charge or debit to this account? A. Yes, sir.

Q. Would you indicate to me what the origin of that item of \$5,445.00 is?

A. Yes, sir. that is the posting right here, sir (indicating). This is described as "Record of sales, page 11, September, 1948," and here is the posting. It is indicated as Job No. 481-2, would be the second payment, and under date of 9/20, Division of Highways, State of California, \$5,445.00. This is the debit to accounts receivable, and this is the counter credit to sales.

(Testimony of Samuel Mendelson.)

Then from this record you would post, in summary form, this total to the accounts receivable in the general ledger and credit to sales in the general ledger, and then you would take the individual page, as it is here in your sales register letter, \$5,445.00, State of California, Division of Highways.

Q. Let me ask you, Mr. Mendelson, this sales register account, does that represent invoices or billings by Evans Construction Company?

A. I would assume that it was, sir. That is the normal bookkeeping accounting procedure, when you bill a customer, to put it through a sales register where the totals are posted to both the general ledger and the subsidiary account.

Q. But you don't know whether in this particular instance [30] that was the manner in which these entries to the sales register originated?

A. May I ask you a question, sir? You mean, do I actually see a billing——

Q. Yes.

A. ——or a bill head of some sort? No, sir, I did not.

Q. But your testimony is as an accountant?

A. Yes, sir. That the general procedure would be that.

Q. Now, I would like to know, too, Mr. Mendelson, I understand that the entries to the accounts receivable account, Plaintiff's Exhibit 6, in total differed in minor degrees from the amount ultimately paid to Evans Construction Company under this

The Court: All right.

Mr. Shapro: May I have one moment, your Honor? I want to check with the Complaint.

Mr. Chadwick, will you stipulate with me to take my statement in lieu of testimony, which I will be glad to give if you prefer it, that the funds of the bankrupt estate are insufficient to pay the claims of creditors in full?

Mr. Chadwick: Certainly I will so stipulate.

Mr. Shapro: That is in the necessary allegations of our complaint. Thank you.

May I recall Mr. Evans for a moment, your Honor?

### WILLIAM JASON EVANS

recalled; previously sworn:

#### Redirect Examination

By Mr. Shapro:

Q. When or after you gave this assignment on the Chamberlain Creek job to the Bank of America on September 15, 1948, did you notify any of the three creditors whose names you have mentioned, Hein, McCosker or Ragland, of the fact that you had made such assignment to the Bank of America?

A. No, I didn't notify anyone. [33]

Mr. Shapro: That is all. Thank you.

(Witness excused.)

Mr. Shapro: Now, may I call as an adverse witness the representative of the Bank, please?

The Court: All right.

J. LYON

called as an adverse witness on behalf of the plaintiff; sworn:

Direct Examination

By Mr. Shapro:

Q. Please state your name to the Court.

A. My name is J. Lyon.

Q. And your first name?

A. The initial "J."

Mr. Shapro: May the record show, your Honor, the witness is being called as an adverse witness under the rule?

Q. You are employed by the Bank of America?

A. That is correct.

Q. In what capacity?

A. I am in charge of the note department there.

Q. What branch?

A. Berkeley Main Office.

Q. Now, did you have charge of the note account on the Chamberlain Creek job for Evans?

A. No, I did not.

Q. You did not have. Do you have the records of that account with you? [34]

A. I believe they are here, yes.

Mr. Chadwick: (Handing document to the witness.)

Q. (By Mr. Shapro): Mr. Lyon, from the records of the Bank can you tell us how the payments received by the Bank on the notes numbered 1 and 2, namely the loans 5916 and 5959, were paid to the Bank?



(Testimony of J. Lyon.)

A. You mean where the proceeds came?

Q. Yes.

A. Well, in reviewing the documents, the way these were credited was that when we would receive a warrant from the State it was applied to this commercial account.

Q. A special account?           A. Right.

Q. Let's be sure, now. When you say "commercial" in this case, you are talking about that of the two commercial accounts which is designated "special," right?           A. That is correct.

Q. Then the first two notes, namely, Nos. 5916 and 5959, were paid to the bank how?

A. The payment of \$5,445.00.

Q. And the payment of notes——

The Court: Well, he didn't answer your question as to where the proceeds came from.

Mr. Shapro: He said it came from the \$5,445.00. You see, your Honor, it has on page 2 of the Answer, line 27—— [35]

The Court: I have that.

Mr. Shapro: You have that before you?

The Court: Yes.

Q. (By Mr. Shapro): That amount, that identical amount, was received from the State of California, was it not, on October 6? Turn the page. We are using the same piece of paper.

A. I don't know whether that was one amount or not.

Q. Well, would you look at the next page of the

(Testimony of J. Lyon.)

sheet you were looking at, and I think you will find that it is?        A. Are you on page 2?

Q. I am on page 2 that lists the 13 notes; right?

A. Yes.

Q. Now, at the top of the next page it shows the amount of the State of California warrant and the date you received it.        A. Oh, yes.

Mr. Shapro: This was information furnished me by the bank, your Honor.

The Witness: That is right.

Q. (By Mr. Shapro): So that the warrant for \$5,445.00 was received by the bank from the State of California on October 6, 1948, right?

A. That is correct.

Q. And you have just testified that the two notes, 5916 and 5955, were paid to the bank on October 11, 1948, from that [36] \$5,445.00?

A. That is correct.

Q. Now, on November 12, 1948, the bank received a warrant from the State for \$839.25, right?

A. Um-hum.

Q. And on November 16, 1948, \$888.10 was applied against Note No. 7, is that correct?

A. That is correct.

Q. And on December 9, 1948, the bank received a warrant from the State for \$6,720.00, right?

A. That is right.

Q. And on December 13, 1948, the bank applied a payment of \$6,666.90 to Notes 4, 5 and 10, and cleared the balance then owing on Notes 3 and 7, with interest?        A. That is right.

Q. On January 6th, 1949, the bank received a

(Testimony of J. Lyon.)

warrant from the State for \$3,785.76, which warrant it applied to Note 6747, is that right?

A. That is right.

Q. In other words, that particular warrant, namely, the January 6th one for \$3,785.76, was not deposited in the special account at all, was it?

A. No, it wasn't.

Q. It was applied directly to the loan?

A. Yes. [37]

Q. Now, on March 22, 1949, the bank received a warrant from the State for \$2,834.51, right?

A. Right.

Q. And on the same date, March 22nd, 1949, \$1,834.51 of that was applied on Note 6747?

A. Correct.

Q. And the last payment the bank received was warrant on April 7, 1949, from the State, for \$1,721.53, which on the same date was applied to the extent of \$1,679.73 as a balance of principal and \$69.09 interest on the last of the notes outstanding?

A. That is right.

Q. And it is true, is it not, Mr. Lyon, that the last two payments, namely, \$1,834.51 and \$1,679.73, were acquired by the bank by a debit to the special account?

A. Yes, that is right.

Q. And then, just so that the Court will have a clear picture, the other payments, that is, the payment denominated 1, 2, 3 and 4, on your Honor's Answer—payments denominated 1, 2, 3 and 4, were received in the form of a check signed by Evans. drawn on that special account?

(Testimony of J. Lyon.)

A. That is right.

Q. And the warrants that you have identified on approximately the same dates were deposited and credited to the special account on the same date by the bank? [38]

A. Yes.

Mr. Shapro: No further questions.

Mr. Chadwick: I would suggest, Mr. Shapro, inasmuch as you have been working from this memorandum, that it has not been amplified and clarified to the allegations, that we adopt it as a partial stipulation of fact.

Mr. Shapro: I have no objection to so doing. It might aid the Court.

Mr. Chadwick: You might put it in a little better form for the Court.

Mr. Shapro: Well, that is all right.

The Court: Do you want to just mark it in evidence?

Mr. Shapro: I think we can take these two sheets off. We have spare copies. It might aid your Honor in the consideration of the case.

The Court: Well, these last papers may be marked for identification in amplification and explanation of the witness' testimony.

(Thereupon the document referred to was admitted into evidence as Plaintiff's Exhibit No. 7.)

Mr. Shapro: That is all.

(Witness excused.)

Mr. Shapro: Plaintiff rests.

The Court: Well, what is in the record to show where there was publication? [39]

Mr. Shapro: There is an admission in the pleadings that the statute was not complied with.

The Court: Oh.

Mr. Shapro: That is expressly admitted in the pleadings.

The Court: Then before we proceed further we will take a brief recess.

(Short recess.)

Mr. Chadwick: If your Honor please, I think we can submit this matter on the case as it has gone thus far, with one possible exception.

Will you stipulate, Mr. Shapro, that the payments that were made by the State of California on this Chamberlain Creek job, that the State warrants were drawn payable to the Bank of America, NT&SA, assignee of Evans Construction Company?

Mr. Shapro: I will so stipulate.

Mr. Chadwick: And each of those were so made payable?

Mr. Shapro: I will so stipulate.

Mr. Chadwick: Your Honor, I don't think it is necessary for us to produce any further evidence here. I believe the entire matter is now laid out in the record.

Mr. Shapro: Submitted.

The Court: Both sides submit the present record, then?

Mr. Shapro: Yes, your Honor.



Mr. Chadwick: Yes, your Honor.

The Court: Would you like to make some statements about [40] the matter?

Mr. Shapro: Well, your Honor, if I may, I don't think this is the type of case—subject to your Honor's wishes, of course—that much can be contributed by oral argument or statement in the case. As you can see, there is very little conflict so far as the evidence is concerned.

There are serious questions of law involved. This is an important case from the standpoint of the administration of a bankrupt estate. It is equally important, I am sure, from the angle of good banking practice, and as to the effect of this statute.

It is my suggestion, your Honor, if it meets with your approval and that of counsel, that this matter be considered by your Honor on briefs, with a little more than normal time to be allowed, because we have discussed this matter for three years.

In other words, we have exchanged legal views with counsel and his predecessor, so we know pretty much what the other fellow's points are. We have done considerable research, I think on both sides, in connection with the matter, and I feel—I can't speak for Mr. Chadwick—

The Court (Interposing): What do you want to do, make a sort of a guinea pig out of this case?

Mr. Shapro: Oh, no, no, no.

The Court: So far as I can see, there is only about [41] thirty-two or three hundred dollars involved.

Mr. Shapro: Oh, no, your Honor. We are not

limited to recovery for the creditors. The United States Supreme Court has held if it is void as to one, it is void as to all. We are not confined to only thirty-two hundred dollars.

The Court: All creditors can share?

Mr. Shapro: Yes, all the creditors can share. At least, that is our position.

Mr. Chadwick: That I won't concede.

Mr. Shapro: We know you won't concede that.

The Court: However, that wouldn't make any difference if there could be a recovery.

Mr. Shapro: I appreciate that.

The Court: You might be able to use it all up for administrative expenses.

Mr. Shapro: If it were only \$3,200.00, I might get away with that. But as far as we are concerned, we would like, your Honor, to submit the matter upon briefs. We would have to make our prima facie showing on the authorities, as well.

The Court: Is there any question you are raising as to the statute itself?

Mr. Chadwick: Yes, your Honor.

Mr. Shapro: Oh, yes.

The Court: You mean as to the validity of it?

Mr. Chadwick: No, as to its application to this particular [42] case.

The Court: I gather from what you said that the contention you are going to make is that it doesn't apply in the case of an account?

Mr. Shapro: An account such as this.

The Court: Failure——

Mr. Shapro: Yes, that is one of the big points in the case.

Mr. Chadwick: Yes, that is the first point.

Mr. Shapro: Yes.

The Court: You mentioned there was some division on that?

Mr. Chadwick: Well, your Honor, as I recall, there is a case out of the Southern District, decided in 1952, in re Richards, which is the only case I have seen which involves the construction of this California statute, and on the facts it isn't by any means on all fours with the factual situation here.

Mr. Shapro: There is another case out of the Southern District of California which, from our standpoint—that is Menick versus Carson—in which the judge considered all of the questions that have been raised by counsel this morning—all of them, including the applicability of this statute to the posting of accounts receivable collected by the assignee prior to the consideration of filing suit.

The Court: The California statute must be not too old. [43]

Mr. Shapro: 1947, I think.

Mr. Chadwick: 1945.

(Discussion between Court and counsel off the record.)

The Court: All right, submitted. 20, 20 and 10.

(Thereupon this matter was submitted and the case adjourned.)

## CERTIFICATE OF REPORTER

I, Official Reporter, certify that the foregoing transcript of 43 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ KENNETH J. PECK.

[Endorsed]: Filed September 12, 1956. [43-A]

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[Title of District Court and Cause.]

## EXCERPT FROM DOCKET ENTRIES

1952

Mar. 31—Filed complaint—issued summons.

\* \* \*

1953

May 19—Filed amended complaint.

July 1—Filed answer of defendant to amended complaint.

\* \* \*

1955

Aug. 11—Filed amendment to answer to amended complaint

Aug. 11—Filed substitution of George Chadwick, Jr., as counsel for Bank of America.

\* \* \*

Oct. 18—Court trial. Plaintiff's motion to dismiss count two of complaint granted. Evidence and exhibits introduced, memos ordered filed 20-20-10 days, and case continued to December 9, 1955, for submission. (Judge Goodman.)

1956

Apr. 12—Filed memorandum opinion and order for judgment. (Judgment for defendant. Counsel to present findings, conclusions and judgment.) (Judge Goodman.)

\* \* \*

Aug. 6—Filed findings and conclusions.

Aug. 6—Entered judgment—filed Aug. 6, 1956—  
for defendant.

Aug. 7—Mailed notices.

Aug. 9—Filed notice and motion by plaintiff for  
new trial, Aug. 14, 1956.

Aug. 14—Ordered after hearing, motion for new  
trial submitted. (Judge Goodman.)

Aug. 15—Filed order denying motion for new trial.

Aug. 17—Filed notice of appeal by plaintiff.

Aug. 17—Filed appellant's designation of record on  
appeal.

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO  
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States  
District Court for the Northern District of Cali-



foria, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for the appellant:

Excerpt from Docket Entries.

Complaint.

Amended Complaint.

Answer to Amended Complaint.

Pretrial Order.

Substitution of Attorney.

Amendment to Answer to Amended Complaint.

Opinion and Order for Judgment.

Findings of Fact and Conclusions of Law.

Judgment.

Motion for New Trial.

Order Denying Motion for New Trial.

Notice of Appeal.

Designation of Record on Appeal.

Reporter's Transcript of Proceedings, October 14, 1954.

Reporter's Transcript of Proceedings, October 18, 1955.

Plaintiff's Exhibits 1, 2, 3, 4, 5, 6 and 7.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 26th day of September, 1956.

[Seal]

C. W. CALBREATH,  
Clerk;

By /s/ MARGARET P. BLAIR,  
Deputy Clerk.

[Endorsed]: No. 15,321. United States Court of Appeals for the Ninth Circuit. John Costello, as Trustee of the Estate of William Jason Evans, Bankrupt, Appellant, vs. Bank of America National Trust & Savings Association, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed September 26, 1956.

Docketed October 9, 1956.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

United States Court of Appeals  
for the Ninth Circuit

No. 15,321

JOHN COSTELLO, Trustee of the Estate of  
William Jason Evans, Bankrupt,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND  
SAVINGS ASSOCIATION, a National Bank-  
ing Association,

Appellee.

APPELLANT'S CONCISE STATEMENTS OF  
POINTS TO BE URGED ON APPEAL

Comes now John Costello, Appellant herein, and in accordance with Rule 17 (6) of the Rules and Practice of the United States Court of Appeals for the Ninth Circuit, specifies the following as a concise statement of the points on which he intends to rely on this appeal from the Judgment made and entered by Hon. Louis E. Goodman, Judge of the United States District Court for the Northern District of California, on August 6, 1956, and more particularly specified and described in Notice of Appeal heretofore filed with the Clerk of said District Court on August 17, 1956, as follows:

That the conclusions of law Nos. 4 and 5 are not supported by the evidence and are contrary to the law in that

I.

That the District Court in said Judgment erred in finding that once the account is paid pursuant to the unrecorded assignment, it (the account) is extinguished.

II.

That the District Court in said Judgment erred in holding that Plaintiff could not recover from Defendant the proceeds of the unrecorded assignment already collected by Defendant.

Dated: October 10, 1956.

Respectfully submitted,

SHAPRO & ROTHSCHILD,

By /s/ DANIEL ARONSON, JR.,

Attorneys for Appellant, John Costello, Trustee of  
the Estate of William Jason Evans, Bankrupt.

[Endorsed]: Filed October 12, 1956.

